TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 827.

MORITA KEIZO, PLAINTIFF IN ERROR,

vs.

WILLIAM HENRY, HIGH SHERIFF OF THE TERRITORY OF HAWAII.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

FILED NOVEMBER 9TH, 1908.

(28,864.)

(20,584.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

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MORITA KEIZO, PLAINTIFF IN ERROR,

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WILLIAM HENRY, HIGH SHERIFF OF THE TERRITORY OF HAWAII.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

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a UNITED STATES OF AMERICA:

Supreme Court of the Territory of Hawaii.

Ex Parte: In the Matter of the Petition of MORITA KEIZO for a Writ of *Habeas Corpus.*

1 In the Supreme Court of the Territory of Hawaii, October Term, A. D. 1906.

($2. Stamps.)

Ex Parte: In the Matter of MORITA KEIZO.

Petition for Habeas Corpus.

To the Honorable The Supreme Court of the Territory of Hawaii:

Your Petitioner, Morita Keizo, a subject of the Emperor of Japan, respectfully shows that he is unlawfully held in custody, imprisoned and restrained of his liberty by William Henry, High Sheriff of the Territory of Hawaii, in the Territorial Penitentiary, at Honolulu, in said Territory.

Your Petitioner further states that he is held in custody, imprisoned and restrained of his liberty by the said Henry, as aforesaid, under and by virtue of the following proceedings, that is to say, on the 22nd day of August, A. D. 1905, your Petitioner was indicted by a so-called grand jury at the August A. D. 1905 term of the Circuit Court of the Fourth Judicial Circuit of the Territory of Hawaii, for the crime of murder in the first degree, an exact copy of which said indictment is hereto attached marked "Exhibit A," and made a part of this petition; that your petitioner was not committed to nor held to answer the grand jury for the said August Term of said Circuit Court, and neither your Petitioner nor his counsel knew or had reason to know that said grand jury would hear or consider evidence as to the premises in said indictment set forth, until after the said grand jury had been sworn in at the said term, and that
2 your Petitioner had no opportunity to challenge any of the members of the said grand jury for or by reason of any matter or thing which would have operated as a legal disqualification of any of the said grand jurors to serve in that capacity; that said indictment was presented and filed in said Circuit Court on the 22nd day of August, A. D. 1905, and that on the 24th day of August, A. D. 1905, your Petitioner being brought to the bar of the said Circuit Court and then and there demanded to plead to the said indictment, filed his certain plea in abatement to the said indictment, in which he alleged that the said indictment was found and presented to the said Circuit Court by a grand jury which was not composed of persons by law competent and entitled to act as grand jurors; that the said grand jury was composed of sixteen persons only, that is to say: G. Seits, E. Soper, L. S. Canario, F. B. C. De

Mello, B. Da Camara, Jr., H. H. Sisson, V. R. M. Fitzsimmons, Jules C. Carvalho, J. W. Leonhart, A. P. Brickwood, P. K. Naihe, J. P. Fernandez, Jr., J. J. Horner, M. A. Ryeroft, J. C. Carter and M. De F. Spinola; that of the aforesaid persons who acted as grand jurors and who heard and considered the evidence upon which the said indictment was based, the following named were not, when they so acted, as grand jurors aforesaid, nor at the time of the filing of said plea, citizens of the United States, and were, accordingly, incompetent to serve or act as such grand jurors, that is to say, F. B. C. De Mello, B. Da Camara, Jr., L. S. Canario Jr., Jules C. Carvalho, J. P. Fernandez Jr., M. De F. Spinola, G. Seits and E. Soper, and upon said plea, an exact copy whereof is hereto attached marked "Exhibit B" and made a part of this Petition, your Petitioner prayed the judgment of the said Circuit Court that said indictment be quashed and held for naught; that on the same day, to wit, the 24th

3 day of August, A. D. 1905, the Territory filed its replication to the said plea, an exact copy whereof is hereto attached marked "Exhibit C" and made a part of this petition, in which it was affirmatively alleged that all of the persons composing said grand jury were citizens of the United States, that thereafter, to wit, on the 31st day of August, A. D. 1905, the Territory and your Petitioner entered into, signed and filed in the said Circuit Court a stipulation, whereby it was agreed that the following facts should be considered as proved for all of the purposes of said case, that is to say, that your Petitioner was not committed to the said grand jury for the August Term, 1905, and neither your Petitioner nor his counsel knew or had reason to know that the said grand jury would hear or consider evidence in the above entitled case until after the said grand jury was sworn to act as such grand jury at said term; that of the grand jurors summoned and sworn at the said term only sixteen heard and considered the evidence against your Petitioner and only sixteen of such jurors as set forth in your Petitioner's amended plea in abatement, found a true bill against your Petitioner; that of the said grand jurors, eight thereof, as named in said amended plea in abatement (on page 2) were foreign born and of alien parentage and were never naturalized and never did become citizens of the United States of America, except as they may have become naturalized in the following manner, to wit: That at sometime between June 14, 1900, and August 1, 1905, each of the said eight grand jurors being entitled to naturalization, applied for a judgment of naturalization to the Circuit Court of the Fourth Circuit, Territory of Hawaii, and upon such applications the said court pronounced upon each of the said applicants a judgment of naturalization.

An exact copy of said stipulation is hereto attached marked

4 "Exhibit D" and made a part of this petition; that the amended plea in abatement mentioned in said stipulation is the plea at all times hereinbefore and hereinafter mentioned; that on the 1st day of March, A. D. 1906, the same being a judicial day of the February, A. D. 1906 term of the said Circuit Court, the said Circuit Court held and adjudged the issues presented by the said

plea and the said replication thereto, and said stipulation, against your Petitioner and in favor of the Territory; that the said Circuit Court heard and determined the issues presented by the said plea and the said replication and said stipulation, sitting without a jury, the Territory and the then Counsel for your Petitioner having waived a trial by jury of the said issues; that before determining the said issues so presented by the said plea and the said replication and said stipulation the said Circuit Court, under Section 1862 of the Revised Laws of Hawaii (1905), reserved the questions of law presented by said plea, said replication and said stipulation, for the decision of the Supreme Court of said Territory and the said questions having been certified to the said Supreme Court by the said Circuit Court, the said Supreme Court on the 3rd day of January, A. D. 1906, decided the said questions in the affirmative and said judgment of said Circuit Court overruling said plea in abatement was based solely and exclusively on said Decision of said Supreme Court; that before reserving said questions of law for the decision of the said Supreme Court, said Circuit Court specifically found and decided as a matter of fact that said grand jury was composed of sixteen members and that eight of the members of said grand jury, to wit, G. Seits, E. Soper, L. S. Canario, F. B. C. De Mello, B. da Camara Jr., Jules C. Carvalho, J. P. Fernandez, Jr., and M. F. Spinola, were born of alien parents and only became citizens of the United States by virtue of certain judgments and decrees of naturalization pronounced in the Circuit Court of the Fourth Judicial Circuit of the Territory of Hawaii, at sometime between the 14th day of June A. D. 1900 and the 1st day of August, A. D. 1905, and that the questions so reserved by the said Circuit Court for the decision of the said Supreme Court and so decided by said Supreme Court in the affirmative were as follows:

First. Had the Circuit Court of the Fourth Circuit of the Territory of Hawaii, between June 14, 1900, and August 1, 1905, jurisdiction to pronounce judgments of naturalization upon the eight aliens whose names are set forth in defendant's amended plea in abatement?

Second. Was the grand jury of this Circuit, empaneled and sworn for the August, 1905, term of this Court, comprising sixteen members, eight of whom were naturalized as aforesaid, a legal body under the laws of this Territory, and competent to find a legal indictment against the defendant?

Third. Shall the defendant be held to answer the indictment thus found by the said grand jury?

An exact copy of the reservation of said questions for the decision of said Supreme Court, by the said Circuit Court, is hereto attached marked "Exhibit E" and made a part of this petition, and an exact copy of the decision of the said Supreme Court, on said reserved questions, is hereto attached marked "Exhibit F" and made a part of this petition.

That your Petitioner seasonably and regularly tendered his Bill of Exceptions to the aforesaid judgment of the said Circuit Court overruling his said plea in abatement and the said bill was duly and

regularly sealed and signed by the said Circuit Court on the 12th day of March, A. D. 1906, the same being a judicial day in
6 the February, A. D. 1906 term of said Circuit Court, an exact copy of which said Bill of Exceptions is hereto attached marked "Exhibit G" and made a part of this petition.

And your Petitioner further alleges and says that after the rendition of the aforesaid judgment of the said Circuit Court overruling his said plea in abatement, such further proceedings were had in the said Circuit Court at the February A. D. 1906 term thereof, that your Petitioner was found guilty by a trial jury of the premises charged in said indictment, and on the 22nd day of March, A. D. 1906, your Petitioner was by the said Circuit Court adjudged and sentenced to be hung by the neck until dead on such day as might be fixed by the Governor of the Territory of Hawaii, and that pending the execution of said death sentence your Petitioner be held in custody by the High Sheriff of the Territory of Hawaii; that your Petitioner duly appealed from said judgment and sentence to the Supreme Court of the Territory of Hawaii which said Supreme Court affirmed the said judgment and sentence; that your Petitioner is now held in custody and restrained and imprisoned of his liberty by the said William Henry as High Sheriff of the said Territory in the Territorial Penitentiary at Honolulu, under and by virtue of the said sentence and a Mittimus of said Circuit Court, exact copies of which are hereto attached (as one document) marked "Exhibit H" and made a part of this petition; that the Governor of the Territory of Hawaii on the 8th day of January, A. D. 1907 directed and delivered to the said William Henry, as High Sheriff aforesaid, a death warrant, an exact copy of which is hereto attached marked "Exhibit I" and made a part of this petition, commanding
7 the said Henry as High Sheriff aforesaid, to execute the aforesaid sentence of said Circuit Court on your Petitioner between the hours of eight of the clock in the morning and five of the clock in the afternoon on the 22nd day of January, A. D. 1907, and that it is the determination of said Henry to execute the said sentence and the said death warrant.

Your Petitioner further alleges that the said Circuit Court had no jurisdiction or lawful authority to proceed against your Petitioner under said indictment in manner and form aforesaid and that the said indictment, pretended trial and conviction of your Petitioner, and the said sentence, mittimus and death warrant whereby your Petitioner is held in custody by the said William Henry, as High Sheriff, aforesaid, and under color of which the life of your Petitioner is to be taken as aforesaid, were and are each and all of them, wholly without authority of law, in violation of the Constitution of the United States, the laws of the United States and the laws of the Territory of Hawaii, and void.

And your Petitioner alleges that the said indictment, pretended trial, conviction, sentence, mittimus and death warrant, are, each and all of them, void, for that eight of the sixteen members of the said grand jury which found and presented said indictment were not at the time said indictment was found and presented citizens of the

United States and were not competent to serve as grand jurors in the Territory of Hawaii under the laws of the United States (31 Stats. 141, c. 339, Sec. 83) and the laws of the Territory of Hawaii (Revised Laws 1906, secs., 1770, 1771); that the judgments and decrees of naturalization of the said eight persons hereinbefore named, by the Circuit Court of the Fourth Judicial Circuit of the Territory of Hawaii were and are, each and all of the said judgments and decrees, wholly null and void upon the face
8 thereof, as the said Circuit Court was wholly without jurisdiction in the premises under Section 2165 of the Revised Statutes of the United States, and that the said indictment and all proceedings had thereunder by the said Circuit Court are wholly null and void because in violation of the Fifth Amendment to the Constitution of the United States, which provides that no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, and that no person shall be deprived of life or liberty without due process of law, and that said indictment and all proceedings had thereunder in said Circuit Court, are wholly null and void because in violation of section 83 of the Organic Act of Hawaii, (31 Stats. 144, c., 339) which provides that the number of grand jurors in each Circuit shall be not less than thirteen.

Wherefore your Petitioner prays that a writ of *habeas corpus* may be issued out of and under the seal of this Honorable Court to be directed to the said William Henry, High Sheriff of the Territory of Hawaii commanding him to have the body of your Petitioner, together with return of the date and cause of his detention, before this Honorable Court on a day to be designated therein; and that, unless the exhibits attached to this petition be admitted to be true copies of the originals on file in said Circuit Court, a writ of certiorari issue directed to said Circuit Court of the Fourth Judicial Circuit of the Territory of Hawaii or of the judge thereof, commanding that there be certified to this Court on a day to be therein designated, a full and complete transcript of the record and proceedings touching the matter of your Petitioner's said detention, conviction, sentence and imprisonment. And your Petitioner prays that, pending the final determination of this petition, this Honorable Court may
9 order and direct that the said William Henry as High Sheriff aforesaid, do absolutely refrain from executing the said sentence and the said death warrant.

And your Petitioner further prays that he may have such other and full relief in the premises as may be appropriate and that he may be discharged from such custody and imprisonment; and your Petitioner will ever pray, etc.

(Signed) MORITA KIZO, *Petitioner.*

(Signed) A. S. HUMPHREYS, *Counsel.*

TERRITORY OF HAWAII, *County of Hawaii, ss:*

Morita Keizo being duly sworn deposes and says that he is the Petitioner above named; that he has heard read the foregoing pe-

tition by him subscribed and knows the contents thereof, and that the matters and things therein stated are true.

(Signed) MORITA KIZO.

Sworn to and subscribed before me this 16th day of January, A. D. 1907.

(Signed) E. G. FERREIRA,

[SEAL.] *Notary Public, First Judicial Circuit.*

10 "EXHIBIT A."

THE TERRITORY OF HAWAII, *Fourth Circuit, To wit:*

At a term of the Circuit Court, begun and holden at Honokaa, in the Island of Hawaii, within and for the Fourth Circuit of the Territory of Hawaii, on the 16th day of August in the Year of our Lord One Thousand Nine Hundred and Five, The Grand Jurors of the Territory of Hawaii, duly empaneled and sworn in and for the Circuit Court of the Fourth Judicial Circuit of the Territory of Hawaii, upon their oaths, present that Morita Keizo, whose true name is to the members of this Grand Jury unknown, of Hilo District of South Hilo, in the Island of Hawaii, in the Fourth Circuit, at Hilo, District of South Hilo, in the Island of Hawaii, and in the Circuit aforesaid and within the jurisdiction of this Honorable Court, on the first day of January in the Year of Our Lord One Thousand Nine Hundred and Five, with force and arms, feloniously wilfully, and of his deliberate premeditated malice aforethought, and without authority, justification or extenuation by law did kill and murder one, Moriyama Kintaro, then and there being, and did then and there and thereby commit the crime of murder in the first degree:

And the Grand Jurors aforesaid, upon their official oaths aforesaid do further say and present that Morita Keizo, whose true name is to the members of this Grand Jury unknown, of Hilo, in the District of South Hilo, in the Island of Hawaii, in the Circuit aforesaid, and within the jurisdiction of this Honorable Court, on the 1st day of January in the Year of Our Lord One Thousand Nine Hun-

11 dred and Five with force and arms feloniously, willfully, and of his deliberate, premeditated malice aforethought and without authority, justification or extenuation by law, in and upon one Moriyama Kintaro, then and there being, with intent in him, the said Morita Keizo, him the said Moriyama Kintaro, to kill and murder, an assault did make; and that he, the said Morita Keizo, with a certain knife and hatchet, of which said knife and hatchet, a more particular description is to the members of the Grand Jury unknown, he, the said Morita Keizo, in his hand then and there had and held, him the said Moriyama Kintaro, in and upon the body and head of him, the said Moriyama Kintaro, *the said Moriyama Kintaro*, then and there feloniously, wilfully, and of his deliberate, premeditated malice aforethought and without authority, justification or extenuation by law, and with intent in him, the said Morita

Keizo, him, the said Moriyama Kintaro, to kill and murder, did strike, stab, and wound, giving to the said Moriyama Kintaro, then and there with a knife and hatchet aforesaid, and by the strokes aforesaid, in manner aforesaid, in and upon the body and head of him, the said Moriyama Kintaro, mortal wounds, of which said mortal wounds the said Moriyama Kintaro, from the said 1st day of January in the year aforesaid until the 2nd day of the same month of January, in the year aforesaid, at Hilo aforesaid, did languish, and languishing did live; on which said 2nd day of January, in the year aforesaid, the said Moriyama Kintaro, at Hilo aforesaid, of the wounds aforesaid, died; and that so in manner and form aforesaid, and at the time and place aforesaid, the said Morita Keizo feloniously, willfully and of his deliberate, premeditated malice aforethought, and without authority, justification or extenuation by law, and with intent in him, the said Morita Keizo, him, the said
12 Moriyama Kintaro, to kill and murder, did kill and murder the said Moriyama Kintaro, and did then and there and thereby commit the crime of murder in the first degree, contrary to the form of the statute in such case made and provided.

And the Grand Jurors aforesaid, upon their official oaths aforesaid, do further say and present that Honjo Tsurutaro, whose true name is to the members of this Grand Jury unknown, of Hilo, in the District of South Hilo, in the Island of Hawaii, and within the jurisdiction of this Honorable Court, at Hilo, in the District of South Hilo, in the Island of Hawaii, and within the jurisdiction of this Honorable Court, on the 1st day of January, in the Year of Our Lord One Thousand Nine Hundred and Five, before the said felony and murder was committed, in manner and form aforesaid, to wit: on said 1st day of January, in the Year of Our Lord One Thousand Nine Hundred and Five, at Hilo aforesaid, was accessory thereto before the fact, and feloniously, willfully and of his malice aforethought, not being present when said felony and murder was committed, did aid, incite, countenance and encourage the said Morita Keizo in the commission thereof in manner and form aforesaid; and so at the place aforesaid, at the time aforesaid, in the manner aforesaid, he the said Honjo Tsuritaro did then and there and thereby commit the crime of accessory before the fact to the crime of murder in the first degree, contrary to the form of the statute in such case made and provided.

And the Grand Jurors aforesaid, upon their official oaths aforesaid do further say and present that Seki Mitsuda, whose true name is to the members of this Grand Jury unknown, of Hilo in the District of South Hilo, in the Island of Hawaii, and within the
13 jurisdiction of this Honorable Court, at Hilo, in the District of South Hilo, in the Island of Hawaii, and within the jurisdiction of this Honorable Court, on the 1st day of January, in the Year of Our Lord One Thousand Nine Hundred and Five, before the said felony and murder was committed, in manner and form aforesaid, to wit: on said 1st day of January in the Year of Our Lord One Thousand Nine Hundred and Five, at Hilo aforesaid, was accessory thereto before the fact, and feloniously, willfully, and

of his malice aforethought not being present when the said felony and murder was committed, did aid, incite, countenance and encourage the said Morita Keizo in the commission thereof, in manner and form aforesaid, and so at the place aforesaid, at the time aforesaid, in the manner aforesaid, he the said Seki Mitsuda did then and there and thereby commit the crime of accessory before the fact to the crime of murder in the first degree, contrary to the form of the statute in such case made and provided.

A true bill found this 21st day of August, A. D. 1905.

(Sgd.) M. F. PROSSER,
Deputy Attorney General.

(Sgd.) J. W. LEONHART,
Foreman of the Grand Jury.

14 "EXHIBIT B."

In the Circuit Court of the Fourth Circuit, Territory of Hawaii, August Term, Honokaa, Hawaii, 1905.

TERRITORY OF HAWAII
vs.
MORITA KEIZO.

Indicted for Murder in the First Degree.

Defendant's Plea in Abatement.

And the said Morita Keizo in his own proper person comes into court and having read the said indictment says that the said indictment was found and presented in the said court by a grand jury which is not composed of persons by law competent and entitled to act as such grand jurors, to wit: that the said grand jury was composed of the following named persons: G. Seits, E. Soper, L. S. Canario, F. B. C. de Mello, B. da Camara, Jr., H. H. Sisson, V. R. M. Fitzsimmons, Jules C. Carvalho, J. W. Leonhart, A. P. Brickwood, P. K. Neihe, J. P. Fernandez, Jr., J. J. Horner, M. A. Ryeroft, J. C. Carter and M. De F. Spinola. That of the aforesaid persons who acted as grand jurors aforesaid and who heard and considered the evidence upon which the said indictment was found and presented to the said court the following named are not now and never have been and were not at the time they heard and considered the evidence as grand jurors and presented the indictment in this
15 cause citizens of the United States of America, or of the Territory of Hawaii, and for this reason they were and are ineligible and incompetent to act as grand jurors and were so ineligible and incompetent at and before the time of finding and presenting said indictment against this defendant, to wit, F. B. C. de Mello, B. da Camara, Jr., L. S. Canario, Jules C. Carvalho, J. P. Fernandez, Jr., M. de F. Spinola, G. Seits and E. Soper. And these facts the defendant is ready to verify and maintain as the court shall direct.

Wherefore defendant prays the judgment of this court whether he shall or ought to make further plea to said indictment and prays that the said indictment may be abated, quashed and held for nought.

(Signed) CARL S. SMITH,
Attorney for Defendant.

Honokaa, August 24th, 1905.

Endorsed: # 60. Circuit Court, Fourth Circuit. Territory *vs.* Morita Keizo. Plea in Abatement. Filed Aug. 24th, 1905. (Signed) A. S. Le Baron Gurney, Clerk. Carl S. Smith, For Defendant.

16 "EXHIBIT C."

In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii.

TERRITORY OF HAWAII
vs.
MORITA KEIZO.

Indicted for Murder in the First Degree.

Joinder to Defendant's Plea in Abatement.

And now comes the Territory of Hawaii in the above entitled cause by M. F. Prosser, Deputy Attorney General, and denies all the allegations and statements contained in said defendant's Plea in Abatement, and further states and contends that the Grand Jurors for the above mentioned Term of this Honorable Court are citizens of the United States of America and have been regularly and legally summoned and duly empanelled and sworn in as by law provided, and that therefore, they, the said Grand Jurors, each and every one, are eligible and competent to act as Grand Jurors.

Honokaa, August 24th, 1905.

(Signed) M. F. PROSSER,
Deputy Attorney General.

Endorsed: # 69. Circuit Court Fourth Judicial Circuit, Territory of Hawaii. A. D. 1905. August Term, A. D. 1905. Territory of Hawaii *vs.* Morita Keizo. Murder 1st Degree. Joinder in Abatement. Filed Aug. 24th, 1905. (Signed) A. S. Le Baron Gurney, Clerk.

17 "EXHIBIT D."

Circuit Court, Fourth Circuit, Territory of Hawaii.

60.

TERRITORY OF HAWAII
vs.
MORITA KEIZO.

Indicted for Murder in First Degree.

Stipulation of Parties as to Facts.

It is stipulated and agreed by and between the parties hereto that the following facts are true and shall be considered as proved for all the purposes of this case:

1. That the said Defendant was not committed to the grand jury for the August Term, 1905, and neither said defendant nor his counsel knew or had reason to know that the said grand jury would hear or consider evidence in the above entitled case until after the said grand jury was sworn to act as such grand jury at this term:

2. That of the grand jurors summoned and sworn at the said term only 16 heard and considered evidence against said defendant and only 16 of such jurors as set forth in the defendant's amended plea in abatement found a true bill against said defendant:

3. That of the said grand jurors, eight thereof, as named in said amended plea in abatement (on page 2) were foreign born and of alien parentage and were never naturalized and never did become citizens of the United States of America except as they may have become naturalized in the following manner, to wit: That at

18 sometime between June 14, 1900, and August 1, 1905, each of the said eight grand jurors being entitled to naturalization, applied for a judgment of naturalization to the Circuit Court of the Fourth Circuit, Territory of Hawaii, and upon such applications the said Court pronounced upon each of the said applicants a judgment of naturalization.

Honokaa, August 31, 1905.

(Signed) M. F. PROSSER,
Deputy Attorney General.
"
CARL S. SMITH,
Attorney for Defendant.

Allowed

(Signed) C. F. PARSONS, *Judge.*

Endorsed: # 60. Territory of Hawaii *vs.* Morita Keizo. Stipulation. Filed Aug. 31st, 1905. (Signed) A. S. Le Baron Gurney, Clerk.

19 "EXHIBIT E."

In the Circuit Court of the Fourth Circuit, Territory of Hawaii, November Term, 1905.

THE TERRITORY OF HAWAII
vs.
MORITA KEIZO, Defendant.

Murder in the First Degree.

Reserved Questions of Law to the Supreme Court.

Statement of Facts.

On the 21st day of August, A. D. 1905, at the August Term of said court held in Honokaa the grand jury of this circuit impanelled and sworn for said term found a true bill against the defendant Morita Kaizo charging him with the offense of murder in the first degree alleged to have been committed in the District of South Hilo, Island and Territory of Hawaii, on the First day of January, A. D. 1905, upon one Moriyama Kintaro.

On August 24th, 1905, defendant filed a plea in abatement (amended August 31st, 1905) to said indictment alleging among other things that said indictment was found by a grand jury of sixteen men, eight of whom were not citizens of the United States and therefore ineligible and incompetent to act as grand jurors, the Territory by M. F. Prosser, deputy attorney general, entering a joinder to said plea on said last named date.

On August 31st, 1905, stipulation was filed whereby both parties agreed that all issues of law and fact raised by said plea in abatement and traverse be tried and determined by the court without the intervention of a jury, a trial by jury being thereby expressly
20 waived by the parties. Thereafter, to wit, on the 31st day of August, 1905, stipulation in writing was filed in this Court whereby it was admitted by the attorneys for the respective parties:

"1. That said defendant was not committed to the grand jury for the August Term, 1905, and neither said defendant nor his counsel knew or had reason to know that the said grand jury would hear or consider evidence in the above entitled cause, until after the said grand jury was sworn to act as such grand jury at this term."

"2. That of the grand jurors summoned and sworn at the said Term only 16 heard and considered the evidence against said defendant and only 16 of such jurors as set forth in the defendant's amended plea in abatement found a true bill against said defendant."

"3. That of the said grand jurors, eight thereof, as named in said amended plea in abatement (on page 2) were foreign born and of alien parentage and were never naturalized and never did become citizens of the United States of America except as they may have

become naturalized in the following manner, to wit: That at sometime between June 14, 1900, and August 1, 1905, each of the said eight grand jurors being entitled to naturalizaton applied for a judgment of naturalization to the Circuit Court of the Fourth Circuit, Territory of Hawaii, and upon such applications the said Court pronounced upon each of the said applicants a judgment of naturalization."

The following papers are hereby by reference made a part of this statement as fully to all intents and purposes as if physically incorporated herein, viz:

1st. Indictment, presented August 22nd, 1905.

2nd. Plea in abatement; filed August 24th, 1905.

21 3rd. Joinder in abatement; filed August 24th, 1905.

4th. Stipulation as to waiver of Jury; filed August 31st, 1905.

5th. Stipulation of parties as to facts upon plea in abatement; filed August 31st, 1905.

The court finds the facts to be as set forth in said last named stipulation.

Questions of Law Reserved.

Upon the foregoing statement of facts, under authority of Section 1862 of the Revised Laws of Hawaii the following questions of law arising at the hearing of said plea in abatement are hereby reserved for the consideration of the Supreme Court of this Territory:

1st. Had the Circuit Court of the Fourth Circuit, Territory of Hawaii, between June 14th, 1900, and August 1st, 1905, jurisdiction to pronounce judgments of naturalization upon the eight aliens whose names are set forth in defendant's amended plea in abatement?

2nd. Was the grand jury of this circuit impanelled and sworn for the August, 1905, Term of this Court, comprising sixteen members, eight of whom were naturalized as aforesaid, a legal body under the laws of this Territory and competent to find a legal indictment against the defendant?

3rd. Shall the defendant be held to answer the indictment thus found by said grand jury?

It is hereby certified that the foregoing statement contains a true report of so much of the proceedings in said cause as may be

22 necessary to a full understanding of the foregoing questions by the Supreme Court.

CHARLES F. PARSONS,
Presiding Judge.

Hilo, Hawaii, November 23rd, 1905.
[SEAL.]

Attest:
A. S. LE BARON GURNEY, *Clerk.*

Endorsed: In the Circuit Court of the 4th Circuit. Territory of Hawaii. November Term, 1905. Territory of Hawaii *vs.* Morita Kaizo, defendant. Murder in the First Degree. Reserved Questions of Law to the Supreme Court. Filed November 23rd, 1905. A. S. Le Baron Gurney, Clerk.

23 EXHIBIT "F."

In the Supreme Court of the Territory of Hawaii, October Term, 1905.

TERRITORY OF HAWAII
v.
MORITA KAIZO.

Questions Reserved by Circuit Court, Fourth Circuit.

Submitted December 23, 1905; Decided January 3, 1906.

Frear, C. J., Hartwell and Wilder, J. J.

Circuit Courts—Jurisdiction to Naturalize.—Under the naturalization laws of the United States and the Organic Act the circuit courts of this Territory have power to naturalize.

24 *Opinion of the Court by Wilder, J.*

(Hartwell, J., Dissenting.)

Defendant was indicted for murder by a grand jury composed of sixteen members at the August, 1905, term of the Circuit Court of the fourth circuit. He filed a plea in abatement to the effect that eight of the members of the grand jury were aliens and therefore ineligible and incompetent to act. It appeared that some time between June 14, 1900, and August 1, 1905, each of said eight grand jurors being entitled to be naturalized applied for a judgment of naturalization to the circuit court of the fourth circuit, and upon such applications being considered the court pronounced upon each of the applicants a judgment of naturalization.

The following reserved questions were certified to this court:

1. Had the circuit court of the fourth circuit of the Territory of Hawaii between June 14, 1900, and August 1, 1905, jurisdiction to pronounce judgments of naturalization upon the eight aliens whose names are set forth in defendant's amended plea in abatement.

2. Was the grand jury empaneled and sworn for the August, 1905, term of the circuit court of the fourth circuit comprising sixteen members, eight of whom were naturalized as aforesaid a legal body under the laws of this Territory and competent to find a legal indictment against the defendant?

3. Shall the defendant be held to answer the indictment thus found by said grand jury?

The main question for decision is whether under the naturalization laws of the United States and the Organic Act of this Territory the circuit courts of this Territory have power to naturalize.

25 Section 2165 of the revised statutes of the United States provides that aliens may be naturalized by a circuit or district

court of the United States, a district or supreme court of a territory, or a court of record of any state having common law jurisdiction and a seal and clerk.

Section 81 of the Organic Act of this Territory provides as follows: "That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided."

Section 86 of the same act provides, among other things, as follows: "That there shall be established in said Territory a district court to consist of one judge, who shall reside therein and be called the district judge. * * * Said court shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizable in a circuit court of the United States, and shall proceed therein in the same manner as a circuit court. * * * The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several states shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii.

Prior to its annexation to the United States the Republic of Hawaii had a fully organized government, including a judicial system, consisting of courts of original and appellate jurisdiction, whose powers were defined by the constitution and statutes of the republic.

26 The relations between the federal courts and the courts of this Territory are similar to those between federal courts and state courts. Equitable Life Assurance Society *v.* Brown, 187 U. S., 308; *Ex parte* Wilder's S. S. Co., 183 U. S. 545; Hind *v.* Wilder's S. S. Co., 13 Haw. 174. As was said in the last case cited congress "organized the courts and distributed their jurisdiction in this Territory as it has done in no other territory—namely, on the lines of federal and state courts in the several states." Page 182. On page 183 the reason for this was suggested as follows: "The fact that this Territory is so far removed from the mainland is ample to explain why congress intended to make the judgments of our supreme court final except in cases in which a federal question was involved and to permit such cases to be taken up only as they would be taken up from a state court, that is, by a writ of error from the supreme court of the United States." That reason was approved in Equitable Life Assurance Society *v.* Brown, *supra*, at page 551, as follows: "Congress may have considered that, owing to the great distance of the Territory of Hawaii from the continent, the appellate jurisdiction over that Territory should be more restricted than over other territories, and should extend only, as in the case of the several states, to judgments against a right claimed under the constitution, laws or treaties of the United States." But whatever the reasons were, the effect was as stated.

Congress not having established within this Territory the ordi-

nary territorial courts, and having provided a system similar to that in the several states, it follows that the jurisdiction to naturalize in this Territory should be and is the same as in a state namely, by a court of record having common law jurisdiction and a seal and clerk. Each of our circuit courts is a court of record having common law jurisdiction and a seal and clerk. That this was the intention of congress we have no doubt, when it is considered that congress established in this Territory a district court of the United States, the same as is established in every state of the union, and which has, of course, power to naturalize.

27

The privilege of becoming an American citizen is a great one, but the number of courts with jurisdiction to naturalize should not be limited unless congress expressly or by necessary intendment so provides. The tendency of congressional legislation on the subject has been to enlarge rather than to diminish the number of courts which could naturalize. See *Ex parte* Cregg, 2 Curt. 98. The very reason for investing congress with power to establish a uniform rule of naturealized was to guard against a too narrow instead of a too liberal mode of conferring citizenship. Collet *v.* Collet, 2 Dall. 294. The statute intends naturalization certificates to issue from courts of record. Spratt *v.* Spratt, 4 Pet. 393, 408. See also Mutual Benefit Life Insurance Company *v.* Tisdale, 91 U. S. 245. All courts look with favor on proceedings to admit aliens to citizenship. McCarthy *v.* Marsh, 5 N. Y. 284. See also *Ex parte* Butterworth, 1 Woodb. & M. 223.

There is also considerable force in the argument that the courts in this Territory having practically the same jurisdiction as the ordinary territorial district courts, namely, the district court of the United States and the circuit courts of the Territory, have the power to naturalize. In *Ex parte* Lathrop, 118 U. S., 113, the legislature of the Territory of Arizona created and established a county court with concurrent jurisdiction with the district courts the provision in the organic law of Arizona being that the "judicial power of Arizona shall be vested in a supreme court and such inferior courts as the legislative council may by law prescribe." The power of naturalization was expressly given to this county court. It was held this court was an inferior court and that its jurisdiction could be made concurrent with that of every other court inferior to the supreme court. No comment was made upon this express power of naturalization. But, in view of the conclusion reached that any court of record in this Territory having common law jurisdiction and a seal and clerk has power to naturalize, it is unnecessary to say whether our circuit courts are territorial district courts within the meaning of the naturalization statute.

28

Defendant further contends that, even if the circuit court had jurisdiction to naturalize, still the grand jury was improperly constituted, because it does not appear that the eight members of the grand jury in question were naturalized before they were drawn to serve and that they might have been naturalized after having been selected. But the burden is on the defendant to show that they

were aliens at the time they were drawn, and, as he has not done that, the presumption is that they were citizens at that time.

Each of the three reserved questions is answered in the affirmative.

M. F. Prosser, Deputy Attorney General, for Territory.

Carl S. Smith for defendant.

(Signed) A. A. WILDER.

29 *Concurring Opinion of Frear, C. J.*

The statute (Rev. Sts., Sec. 2165) permits naturalization by "a circuit or district court of the United States, or a district or supreme court of the territories, or a court of record of any of the states having common law jurisdiction, and a seal and clerk." Thus the jurisdiction is conferred on federal, state and territorial courts. If the circuit courts of this Territory have it, it must be because they are "district courts" of a territory within the meaning of the statute. The question then is whether the word "district" in the statute is a word of description or a proper name. If it is the latter and refers only to such courts of that name as have been created by congress in other territories the statute does not apply to our circuit courts. If it is descriptive there is no reason why it should not apply.

There is little in a name. Our district courts corresponding most nearly to justices' courts elsewhere do not have jurisdiction to naturalize although they are "district courts" of a territory, nor could our territorial legislature confer such jurisdiction upon even a court of record of general jurisdiction by merely calling it a district court. Even the United States district court of Hawaii does not have this jurisdiction because it is called a district court, though by Act of Congress, because on the one hand it is not a district court of the United States in the sense of a constitutional court, for it is a legislative court just as our circuit courts are, nor on the other hand is it a district court of a territory, for not only does it not have the jurisdiction of such a court in general, but it is a court for the entire Territory. It has such jurisdiction because it has been expressly given the jurisdiction of a circuit and district court of the United States.

It is true that our circuit courts differ from the district
30 courts of other territories in various respects. For instance, they are presided over by their own circuit judges and not by judges of the supreme court assigned to the circuits or districts. They also do not have the combined federal and territorial jurisdiction, but are more like state courts in having the local jurisdiction only. But they are courts of record of general, original, common law jurisdiction, and there is no reason why congress, in distributing the two classes of federal and territorial jurisdiction between two sets of courts in Hawaii, instead of combining them in the same courts as elsewhere, should not have intended that each set should have jurisdiction to naturalize. There can be no doubt that the supreme court of this Territory has such jurisdiction, although that, equally with the circuit courts, has only territorial and not federal jurisdiction. The name "circuit courts" was retained by congress because that name was already in use here.

That the word "district" should be construed in the descriptive sense with reference to territories, is supported by the fact that congress itself so construed the same word with reference to the states when, after conferring jurisdiction to naturalize upon the "supreme, superior, district or circuit court of some one of the states" by the act of 1795, it provided as follows in the act of 1802 (2 St. at L., p. 155); "And whereas, doubts have arisen whether circuit courts of record in some of the states, are included within the description of district or circuit courts: Be it further enacted, that every court of record in any individual state, having common law jurisdiction, and a seal and clerk or prothonotary, shall be considered as a district court within the meaning of this act."

Not only is there no objection to the exercise of such jurisdiction by the circuit courts, for similar courts throughout the states and territories exercise it, but it is particularly desirable that they
31 should have it because in four of the five circuits of the Territory the supreme court cannot sit and in three the United States district court does not sit and in one of the other two the latter court sits only once a year, although it is permitted by the statute to sit at other times and places; and such time and expense would be required for the attendance of applicants where such courts usually sit as would in many instances be prohibitive. Such jurisdiction has been exercised by the circuit courts ever since the establishment of territorial government and probably the majority, about a thousand, of naturalizations, have taken place in those courts. I believe the exercise of such jurisdiction by the circuit courts was begun on the suggestion of United States District Judge Estee, and more recently an application to his successor, Judge Dole, for naturalization by one whose naturalization by a circuit court had been questioned, was denied.

On the whole, although with much doubt, I am of the opinion that the circuit courts have such jurisdiction.

(Signed) W. F. FREAR.

32 "EXHIBIT G."

In the Circuit Court of the Fourth Circuit, Territory of Hawaii, at the February Term, A. D. 1906.

TERRITORY OF HAWAII
vs.
MORITA KAIZO.

Indicted for Murder in the 1st Degree.

Defendant's Exceptions to Overruling Plea in Abatement.

Be it remembered that this cause coming on for hearing at the said Term of the said Court upon issue heretofore joined by the said parties upon the amended plea in abatement of the said defendant and the traverse to said plea of the Territory of Hawaii, and upon

the agreed statement of facts submitted by the parties whereupon the following issues of fact were determined herein, to wit, that the indictment in this cause was found and presented in this Court by a Grand Jury composed of the following named persons, to wit: G. Seits, E. Soper, L. S. Canario, F. B. C. de Mello, B. da Camara Jr., H. H. Sisson, V. R. M. Fitzsimmons, Jules C. Carvalho, J. W. Leonhart, A. P. Brickwood, P. K. Naihe, J. P. Hernandez, Jr., John Hale, J. J. Horner, M. A. Ryeroft, J. C. Carter and M. F. Spinola, and that of said Grand Jury the following were born of alien parents and only became naturalized citizens of the United States of America by certain judgments and decrees of naturalization given in the Circuit Court of the Fourth Circuit of the Territory of Hawaii, at sometime between the 14th day of June A. D. 1900, and the 1st day of August, A. D. 1905: F. B. C. de Mello, B. da Camara, Jr., L. S. Canario, Jules C. Carvalho, J. P. Fernandez, Jr., M. F. Spinola, G. Seits and E. Soper.

33 And the said facts having been found and determined, as aforesaid, the issue was presented to this Court in the said cause whether the Circuit Court of the Fourth Circuit of the Territory of Hawaii, at any time between the 14th day of June, A. D. 1900, and the 1st day of August, A. D. 1905, had jurisdiction to decree the naturalization of the persons last named; and the said issue being tendered to this Court, the following questions of law were by this Court reserved for the consideration of the Supreme Court of the Territory of Hawaii, in accordance with Section 1862 of the Revised Laws of the Territory of Hawaii, to wit:

First. Had the Circuit Court of the Fourth Circuit of the Territory of Hawaii, between June 14, 1900, and August 1st, 1905, jurisdiction to pronounce judgment of naturalization upon the eight aliens whose names are set forth in defendant's amended plea in abatement?

Second. Was the Grand Jury of this circuit, empaneled and sworn for the August 1905 Term of this Court, comprising sixteen members, eight of whom were naturalized as aforesaid, a legal body under the laws of this Territory, and competent to find a legal indictment against this defendant?

Third. Shall the defendant be held to answer the indictment thus found by the said Grand Jury?

And thereafter, to wit, upon the 3rd day of January A. D. 1906, the Supreme Court of the Territory of Hawaii, in an opinion, answered the said three questions in the affirmative, and thereupon, in accordance with the opinion and answer to the said reserved questions of law, this Court, upon the 1st day of March, A. D. 1906, held and adjudged the issues presented upon the said amended plea in abatement and the traverse thereto against the defendant and

34 in favor of the Territory of Hawaii; and thereupon ordered that the said amended plea in abatement by the said defendant be overruled and that the defendant be held to further plead to the indictment aforesaid. And thereupon, in open Court, the defendant, by his counsel, then and there took and noted his exception to the said ruling and adjudication of the Court, which said excep-

tion so taken and noted was by the Court duly allowed, and the said defendant now presenting the exception, the same having been reduced to writing in a summary mode, within the time provided by law, and in accordance with Section 1864 of the Revised Laws of the Territory of Hawaii, the said exception is hereby sealed and allowed upon this 12th day of March, A. D. 1906.

[SEAL.] CHARLES F. PARSONS, *Judge.*

Attest:

A. S. LE BARON GURNEY, *Clerk.*

Endorsed: In the Circuit Court of the 4th Circuit, Territory of Hawaii. At the February Term A. D. 1906. Territory of Hawaii *vs.* Morita Kaizo. Defendant's Exceptions to Overruling Plea in Abatement. Filed March 12, 1906. A. S. Le Baron Gurney, Clerk. Carl S. Smith, attorney for Defendant.

35 "EXHIBIT H."

In the Circuit Court of the Fourth Circuit, Territory of Hawaii, February Term, 1906.

TERRITORY OF HAWAII
vs.
MORITA KEIZO.

Murder, First Degree.

Sentence.

Morita Keizo: The jury duly impaneled and sworn in this cause, after a fair and impartial trial, having found you guilty of the crime of murder in the first degree as charged in the indictment the sentence of this court is that you be taken from this place to such place in this territory as may be selected for your safe keeping by the High Sheriff of the Territory of Hawaii, to be and remain in the custody of the said High Sheriff or his Deputy until such day as shall be fixed by the Governor of this Territory for your execution; that upon said last named day you be removed to the place of execution, there to be hung by the neck until you are dead.

And may God have mercy on your soul.

Hilo, Hawaii, March 22nd, 1906.

(S'g'd) CHARLES F. PARSONS, *Judge.*

I hereby certify the foregoing to be a true and correct copy of the original on file in this office.

[SEAL.] (S'g'd) A. S. LE BARON GURNEY, *Clerk.*

36 In the Circuit Court of the Fourth Circuit, Territory of Hawaii.

Mittimus.

The Territory of Hawaii to the High Sheriff of the Territory of Hawaii or his Deputy:

Morita Keizo having been convicted in the Circuit Court of the Fourth Circuit, Territory of Hawaii, at the February Term, 1906 of the offense of murder in the first degree and by said Court on this day sentenced to be hung.

You are hereby ordered to take said Morita Keizo into your custody, and upon signing of the death Warrant by the Governor to cause said sentence to be executed, in accordance with said Warrant. Hereof fail not.

Witness the Honorable Charles F. Parsons, Judge of the Circuit Court of the Fourth Circuit this 22nd day of March, A. D. 1906.

[SEAL.] (S'g'd) A. S. LE BARON GURNEY,
Clerk.

Endorsed: Issued at 3:30 P. M., March 29, 1906. (S'g'd) A. S. Le Baron Gurney, Clerk.

37 *Certificate.*

TERRITORY OF HAWAII, *Island and County of Oahu, ss:*

I hereby certify the foregoing to be true copies of Mittimus and Sentence, in the matter of Morita Keizo, now on file in this office.

Dated at Honolulu, Oahu, January 12, 1907.

(Signed) WM. HENRY,
High Sheriff, Territory of Hawaii.

38 "EXHIBIT I."

Death Warrant.

The Territory of Hawaii to William Henry, Esquire, High Sheriff of the Territory of Hawaii, Greeting:

Whereas, Morita Keizo, a native of Japan, was indicted on the 21st day of August, 1905, for the Crime of Murder in the First Degree, by the Grand Jury duly drawn impaneled and sworn for the August Term of the Circuit Court of the Fourth Judicial Circuit, begun and holden at Honokaa, Island and County of Hawaii, Territory of Hawaii, on the 16th day of August A. D. 1905, and

Whereas, the said Morita Keizo was duly arraigned before the said Circuit Court of the Fourth Judicial Circuit upon said indictment on the Second day of March, 1906, and pleaded not guilty of

said charge, and thereafter, the said defendant Morita Keizo was put on trial at Hilo in the said Fourth Judicial Circuit Court before the Judge of said Court and before a petit jury duly drawn, impaneled and sworn to try him for the Crime of Murder in the First Degree as set forth in said indictment, which trial continued until March 19th, A. D. 1906, upon which said 19th day of March A. D. 1906 the said trial was concluded, and the said Morita Keizo was convicted by the said petit jury of the Crime of Murder in the First Degree for the killing of Moriyama Kintaro at Hilo, District of Hilo, Island
39 and County of Hawaii, Territory of Hawaii, as set forth in said indictment, and thereafter, to wit, on the 22nd day of March A. D. 1906, in pursuance of said conviction and of the law in such cases made and provided, he, the said Morita Keizo, was sentenced by the judge of the said Circuit Court of the Fourth Judicial Circuit to suffer the punishment of death by being hanged by the neck until he was dead.

Now therefore, I, George R. Carter, Governor of the Territory of Hawaii, by virtue of the authority in me vested by law, in pursuance of the sentence aforesaid, hereby command you as High Sheriff of the Territory of Hawaii, that, laying aside all excuses, you take the said Morita Keizo from his place of confinement in Oahu Prison on the 22nd day of January, A. D. 1907, and on that day, between the hours of eight o'clock in the morning and five o'clock in the afternoon, you obey, fulfill, execute and perform all and every matter and thing specified in the said sentence of the said Judge of the Circuit Court of the Fourth Judicial Circuit, and, further, that you make a due return to the said Circuit Court of the Fourth Judicial Circuit of your action under this warrant.

Witness my hand and the great seal of the Territory of Hawaii, at the Executive Building, in Honolulu, Island and County of Oahu, this Eighth day of January, A. D. 1907.

(S'g'd) G. R. CARTER,
[SEAL.] *Governor of Hawaii.*

40 *Certificate.*

TERRITORY OF HAWAII, *Island and County of Oahu, ss:*

I hereby certify the foregoing to be a true copy of the original Death Warrant in the matter of Morita Keizo, now on file in this office.

Dated at Honolulu, Oahu, January 12, 1907.

(Sgd.) WM. HENRY,
High Sheriff, Territory of Hawaii.

Endorsed: Rec'd $6. Filed January 16, 1907 at 11:5- A. M. J. A. Thompson, Clerk.

41 In the Supreme Court of the Territory of Hawaii, October Term, A. D. 1906.

Ex Parte: In the Matter of the Petition of MORITA KEIZO for a Writ of *Habeas Corpus.*

($2. Stamps.)

Writ of Habeas Corpus.

The Territory of Hawaii to William Henry, High Sheriff of the Territory of Hawaii, Greeting:

We command you that on Thursday the 17th day of January A. D. 1907 at ten o'clock A. M., you have and produce before the Supreme Court of the Territory of Hawaii, in the Supreme Court room in the Judiciary Building in Honolulu, the body of Morita Keizo, who is unjustly imprisoned and restrained of his liberty by you, as it is said, to do and receive what shall then and there be considered concerning him in this behalf. And have you there this Writ, with your doings thereon.

Witness the Honorable W. F. Frear, Chief Justice of the Supreme Court of the Territory of Hawaii at Honolulu, this — day of January A. D. 1907.

(Signed) W. F. FREAR,
[SEAL.] *Chief Justice of the Supreme Court of the Territory of Hawaii.*

42 In the Supreme Court of the Territory of Hawaii.

Ex Parte: In the Matter of the Petition of MORITA KEIZO for a Writ of *Habeas Corpus.*

($2. Stamps.)

Summons.

The Territory of Hawaii to the Sheriff of the County of Oahu or His Deputy:

You are commanded to serve the annexed petition for Writ of *habeas corpus* and the writ of *habeas corpus* in the above entitled matter on William Henry, High Sheriff of the Territory of Hawaii instanter, and to make return of this Writ in our Supreme Court on the 17th day of January A. D. 1907 at ten o'clock A. M.

Witness the Honorable Chief Justice of the Supreme Court of the Territory of Hawaii, at Honolulu, County of Oahu, this 16th day of January, 1907.

[SEAL.] (Signed) J. A. THOMPSON, *Clerk.*

Endorsed: Supreme Court Territory of Hawaii. *Ex Parte.* In the Matter of the Petition of Morita Keizo for a Writ of *Habeas Corpus.* Summons. Issued at 11:15 o'clock A. M., January 16, 1907. J. A. Thompson, Clerk. Returned at 8:22 o'clock A. M. January 17, 1907. J. A. Thompson, Clerk. Received at 11:45 o'clock A. M. Jan'y 16th, 1907 J. K. Kanepuu, Clerk to Sheriff, Honolulu, Oahu.

43 *Return of Service.*

Served the within Writ of *habeas corpus* and petition for writ of *habeas corpus* as follows:

On William Henry, High Sheriff of the Territory of Hawaii, at Honolulu, this 16th day of January 1907, by delivering to him a certified copy of said Writ of *habeas corpus* hereof and of the petition for writ of *habeas corpus* annexed hereto and at the same time showing him the original.

(Signed) W. P. JARRETT,
Dep't Sheriff.

Dated January 16th, 1907.

44 In the Supreme Court of the Territory of Hawaii, October, A. D. 1906, Term.

Ex Parte: In the Matter of the Petition of MORITA KAIZO for a Writ of *Habeas Corpus.*

Return of William Henry, High Sheriff of the Territory of Hawaii.

Now comes William Henry, High Sheriff of the Territory of Hawaii in obedience to the Writ of *Habeas Corpus* heretofore, to wit, on the 16th day of January, A. D. 1907, issued out of the Supreme Court of the Territory of Hawaii, directing and commanding him that he have and produce before the said Court, in its Court Room in the Judiciary Building, at Honolulu, Island and County of Oahu, the body of Morita Kaizo, and has now here the body of the said Morita Kaizo and for return to said Writ alleges and avers as follows, that is to say:

I.

That this respondent is and for more than two years last past has been the duly appointed, commissioned, confirmed and acting High Sheriff of the Territory of Hawaii.

II.

That the said Morita Kaizo was and now is in the custody of this respondent and detained by him in the Oahu Prison at said Honolulu under and by virtue of a judgment and sentence of the Circuit Court of the Fourth Judicial Circuit of the Territory of Hawaii heretofore, to wit, on the 22nd day of March, A. D. 1906, duly signed, entered and filed in said Court in that certain action in
45 which the Territory of Hawaii was plaintiff and Morita Kaizo, the petitioner herein, was defendant; that a further cause for said custody and detention is a certain Mittimus issued out of and from said Fourth Circuit Court in said cause; that said judgment and sentence, and said Mittimus, are the same judgment and sentence and Mittimus respectively referred to as the judgment and sentence and Mittimus by petitioner herein in his Petition, copies of which are annexed thereto marked Exhibit "H."

III.

This respondent denies that the Circuit Court of the Fourth Circuit had no jurisdiction or lawful authority to proceed against the petitioner under the indictment in said petition alleged and or said indictment, pretended trial, and or conviction of said petitioner and or the sentence, Mittimus and or death warrant, whereby said petitioner is held in custody by this respondent as High Sheriff, and or under color of which the life of said petitioner is to be taken, were and or are each and or all of them wholly without authority of law, in violation of the Constitution of the United States, the Laws of the United States and or the Laws of the Territory of Hawaii and or void, as alleged in said petition.

IV.

This respondent further denies that the said indictment, trial, conviction, sentence, Mittimus, and or death warrant, are each and or all of them void for that eight of the sixteen members of the grand jury which found and or presented said indictment were not at the time said indictment was found and or presented, citizens of
46 the United States and or were not competent to serve as grand jurors in the Territory of Hawaii under the Laws of the United States, and or the Laws of the Territory of Hawaii; that the judgments and or decrees of naturalization of the said eight persons named in said petition of the Circuit Court of the Fourth Circuit of the Territory of Hawaii, were and or are each and or all of said judgments, and or decrees, wholly null and or void upon the face thereof, as the said Circuit Court was wholly without jurisdiction in the premises under Section 2165 of the Revised Statutes of the United States and or that the said indictment and or all proceedings had thereunder by the said Circuit Court are wholly null and or void because in violation of the Vth Amendment to the Constitution of the United States, and or that said indictment and or all proceedings had thereunder in said Circuit Court are wholly null and or void because in violation of Section 83 of the Organic Act of Hawaii, as alleged in said Petition.

V.

And by way of further return this respondent alleges and avers as follows, that is to say:

I.

That said defendant was duly and regularly indicted by a grand jury duly empaneled, charged and sworn in and for the Circuit Court of the Fourth Circuit of the Territory of Hawaii in and for a term of said Fourth Circuit begun and holden at Honokaa in the Island of Hawaii, within the Fourth Judicial Circuit of the Territory of Hawaii, on the 16th day of February A. D. 1905. That all of the jurors composing said grand jury were citizens of the United States and of the Territory of Hawaii. But in this behalf this respondent admits that eight of said grand jurors were naturalized and became

citizens of the United States and of the Territory of Hawaii in
47 the manner, at the time, and under the circumstances set out and alleged by the petitioner herein on pages four and five of his Petition and under the stipulation thereto annexed marked Exhibit "D."

II.

That heretofore, to wit, on the 26th day of July, A. D. 1906, the said Morita Kaizo duly petitioned the Supreme Court of the Territory of Hawaii that a Writ of Error issue out of and from said Court directed to the Clerk of the Circuit Court of the Fourth Judicial Circuit commanding and directing him to certify to the said Supreme Court the record, including the transcript of the evidence, oral orders, exhibits and clerk's minutes in said cause, in which he was defendant to the end that certain errors in an Assignment of Errors to said Petition attached and alleged to have been committed by the Circuit Court of the Fourth Judicial Circuit in said cause might be reviewed and corrected, and the judgment and sentence of said Fourth Circuit therein reversed. A copy of said Petition and Assignment of Errors is hereunto annexed and marked Exhibit "A." That thereafter and on, to wit, the 23rd day of October, A. D. 1906, said Writ of Error having been submitted without argument and upon briefs, the said Supreme Court by its written decision duly signed, entered and filed therein, affirmed the said judgment of the said Circuit Court, a copy of which said decision is hereunto annexed, made a part hereof and marked Exhibit "B." That upon submission of the said Writ of Error to the said Supreme Court the said Morita Kaizo, Plaintiff in Error therein, aban-
J. A. T., Clerk, doned the alleged error in the Assignment of
Jan. 17/07. Errors numbered one, in this that he failed and neglected to argue or present in his brief to said Supreme Court the said assignment of error numbered one. A copy of the and only brief filed on behalf of the plaintiff in error in the Supreme Court upon said Writ of Error is hereunto annexed
48 and made a part hereof marked Exhibit "C."

III.

This respondent further avers that the matters and things in the petition herein alleged, for and as to which the petitioner alleges that the Circuit Court of the Fourth Circuit had no jurisdiction or lawful authority to proceed against him in the said cause, in which he was defendant under the indictment, and that the said indictment, trial, conviction, sentence, mittimus and death warrant, whereby he was and is held in custody by this respondent, is or was wholly without authority of law, in violation of the Constitution of the United States, the Laws of the United States and the Laws of the Territory of Hawaii, are all matters and things that have been decided by this Court upon the question of law reserved by the Judge of the Circuit Court of the Fourth Judicial Circuit, as in the petition herein on pages 3, 4 and 5 alleged.

V.

And further answering this respondent alleges that the said petition does not state facts sufficient to entitle the petitioner to the relief therein prayed, or any relief.

Dated Honolulu 17th day of January, A. D. 1907.

(Signed) WM. HENRY,
High Sheriff of the Territory of Hawaii.

ISLAND OF OAHU, *Territory of Hawaii, ss:*

William Henry being first duly sworn deposes and says: That he is the respondent who subscribed to the foregoing Return;
49 that he has read the same and knows the contents thereof and that the same is true of his own knowledge.

(Signed) WM. HENRY.

Subscribed and sworn to before me this 17th day of January, A. D. 1907.

(Signed) JNO. M. KEA,
Notary Public First Judicial Circuit
[SEAL.] *of the Territory of Hawaii.*

50 EXHIBIT "A."

In the Supreme Court of the Territory of Hawaii, at the October Term, A. D. 1905.

THE TERRITORY OF HAWAII, Defendant in Error,
vs.
MORITA KAIZO, Plaintiff in Error.

Writ of Error.

Stamps $2.00.

Petition for Writ of Error.

To the Honorable Justices of the Supreme Court of the Territory of Hawaii:

Your petitioner, Morita Kaizo, respectfully represents:

1. That your petitioner was party defendant in a certain action commenced in the Circuit Court of the Fourth Circuit of the Territory of Hawaii, by the presentment of a certain indictment wherein the Territory of Hawaii was named as party plaintiff, by which said indictment your petitioner was therein charged with the crime of murder in the first degree, in which said action the said Circuit Court of the Fourth Circuit rendered judgment in favor of the said Territory of Hawaii and against your petitioner and sentenced your petitioner to suffer capital punishment, upon the 22nd day of March, A. D. 1906.

2. That your petitioner is aggrieved by the decisions of the Judge of the said Court, of the decisions of the said Court and by the verdict of the jury empaneled in said cause.

3. That there are errors of law and of fact appearing on the record of the said cause, as more specifically appear by the Assignment of Errors, filed by your petitioner herewith.

51 4. That execution in said cause has not been fully satisfied and that the judgment therein was rendered within six months prior to the date hereof, to wit, upon the 22nd day of March, A. D. 1906.

5. That your petitioner has deposited the sum of $25.00 to cover costs hereof and has taken all steps required of him by law to entitle him to have issued a writ of error herein.

Wherefore, your petitioner prays that a writ of error may issue directed to the Clerk of the Circuit Court of the Fourth Circuit of the Territory of Hawaii, in the said cause of the Territory of Hawaii *vs.* Morita Kaizo, which said cause is number 60 of the criminal docket in the said Fourth Circuit Court, commanding said Clerk to send to this Court the record, together with and including a transcript of the evidence, oral orders, exhibits, clerk's minutes, exceptions, notes and bills of exceptions in the said cause, and that the judgment of the said Fourth Circuit Court may be reversed.

Hilo, July 11, 1906.

(S'g'd) MORITA KAIZO,
(S'g'd) By CARL S. SMITH,
His Attorney.

TERRITORY OF HAWAII, *Fourth Circuit, ss:*

Carl S. Smith, being first duly sworn, deposes and says: That he is the attorney of the petitioner in the foregoing petition for a writ of error, that he has read the said petition, knows the contents thereof and that the facts therein stated are true of his own knowledge. That he makes this verification for and on behalf of the said petitioner and for the reason that the said petitioner is in

52 custody in the Oahu Jail at the present time and is unable to personally make the verification on his own behalf.

(Signed) CARL S. SMITH.

Subscribed and sworn to before me on this 12th day of July, A. D. 1906.

(Signed) A. S. LE BARON GURNEY,
[SEAL.] *Clerk of the Circuit Court of the Fourth Circuit.*

Let a writ of error issue in accordance with the prayer of the petition.

——— ———.

53 In the Supreme Court of the Territory of Hawaii, at the October Term, A. D. 1905.

THE TERRITORY OF HAWAII, Defendant in Error,
vs.
MORITA KAIZO, Plaintiff in Error.

Writ of Error.

Assignment of Errors.

Now comes Morita Kaizo, petitioner for a writ of error in the above entitled cause, and shows to the Honorable Supreme Court that the following errors of law and fact occur and appear on the record in the cause of the Territory of Hawaii *vs.* Morita Kaizo, Criminal Docket No. 60 of the Fourth Circuit Court of the Territory of Hawaii wherein the said defendant was charged by indictment with the crime of murder in the first degree.

1. That there is manifest error in that the Circuit Court of the Fourth Circuit aforesaid overruled the defendant's plea in abatement, which said plea was filed in the said Court and cause upon the 24th day of August, A. D. 1905, and thereafter amended by leave of Court upon the 31st day of August, A. D. 1905, and the order of the said Circuit Court of the Fourth Circuit overruling the said plea in abatement, amended as aforesaid, was made and entered in the said cause upon the first day of March, A. D. 1906.

2. That there is manifest error in the ruling of the said Court whereby the said Court sustained the objection of the Deputy Attorney General to the question directed to the witness, Seki
54 Mistuda, which said question was as follows:

Q. You were told not to tell the truth, eh?

3. That there is manifest error in the decision of the said Court in sustaining the objection of the Deputy Attorney General made to the following question directed to the witness, Seki Mistuda, during the trial of the case by the defendant's counsel:

Q. Now from the time of the coroner's inquest and the preliminary hearing in the District Court in Hilo up to the present time, have you ever at any time told any person or persons the same story that you have told here on the stand today, up to the present time in Court or out, the same story practically in detail as you told today on the stand?

4. That there is manifest error in the decision of the Court, by which decision the said Court sustained the objection of the Deputy Attorney General to the following question directed to the witness, Morita Kaizo, by the defendant's attorney, as follows:

Q. In what regard was he held if you know, in what regard was he held by the rest of the Japanese community as to whether or not they were in fear of him?

5. That there is manifest error in the decision of the said Court by which decision the said Court sustained the objection of the Deputy Attorney General to the following question directed to

Morita Kaizo, a witness, during the trial of the said cause, by the counsel for the defendant:

Q. I will ask you whether or not you know or knew, on the first day of January, 1905, and sometime previous to that, of a certain assault that Moriyama, the deceased, made on Kobataki?

55 6. That there is manifest error in the decision of the said Court whereby the said Court sustained the objection of the Deputy Attorney General to the following question directed to the witness, Morita Kaizo, during the trial of the said cause:

Q. I will ask you whether or not in some of the conversations you have had with Moriyama he stated to you any particular acts of violence?

7. That there is manifest error in the decision of the said Court whereby the said Court sustained the objection of the Deputy Attorney General to a question directed to the witness, Morita Kaizo, during the trial of the said cause, as follows:

Q. I will ask you if you knew at the time of the death of Mariyama and previous to that, of the violent character of the deceased?

8. That there is manifest error in the decision of the said Court whereby the Court sustained the objection of the Deputy Attorney General to the following question, directed to the witness, Kobataki, during the trial of the said cause, by the defendant's counsel:

Q. Will you—do you know personally of any definite act of violence committed by the deceased, Moriyama, which was known to the defendant, Morita Kaizo, prior to January 1, 1905.

9. That there is manifest error in the said Court rendering judgment against the said defendant and sentencing the said defendant to suffer the death penalty.

(S'g'd) MORITA KAIZO,
(S'g'd) By CARL S. SMITH,
His Attorney.

Hilo, Hawaii, July 11, 1906.

56 EXHIBIT "B."

TERRITORY OF HAWAII
v.
MORITA KAIZO.

Error to Circuit Court, Fourth Circuit.

Submitted October 15, 1906; Decided October 23, 1906.

Frear, C. J., Hartwell and Wilder, JJ.

Homicide—Evidence.—In a prosecution for murder where the plea is self defense, the defendant testifying that the deceased had a bad feeling towards him, had abused him frequently, struck him with his fist, spit on him, chased him with a knife, and threatened to take his life, and that he was afraid that he would take his life, and it also appearing in evidence that the reputation of deceased for being a violent, dangerous, vindictive, revengeful man was very bad, which reputation was known to defendant, it was not erroneous to refuse to allow defendant to show that the rest of the Japanese community were in fear of the deceased, that the defendant knew of a certain assault made by the deceased on a third party, that the deceased stated to defendant acts of violence he had committed, that defendant knew of the violent character of deceased, and that defendant knew of acts of violence committed by deceased.

Opinion of the Court by Wilder, J.

The defendant was convicted of murder in the first degree in the circuit court of the fourth circuit and comes to this court on writ of error. He admitted the killing but claimed that he was acting in self defense. The only assignments of error relied on by him and argued in his brief relate to the admissibility of evidence tending to show the violent and dangerous character of Moriyama, the deceased, which he claims he was not allowed to show. The trial court on objection by the Territory refused to allow the following questions to be answered:

"In what regard was he (deceased) held, if you know, in
57 what regard was he held by the rest of the Japanese community as to whether or not they were in fear of him?

"I will ask you whether or not you know or knew on the 1st day of January, 1905, and some time previous to that of a certain assault that Moriyama the deceased made on Kobataki?

"I will ask you whether or not in some of the conversations you have had with Moriyama he stated to you any particular acts of violence?

"I will ask you if you knew at the time of the death of Moriyama and previous to that of the violent character of the deceased?

"Will you — do you know personally of any definite act of vio-

lence committed by the deceased Moriyama which was known to the defendant Morita Kaizo prior to January 1, 1905?

The first four questions were put to the defendant and the fourth to a witness, Kobataki, called for the defendant.

The trial court did not refuse to admit evidence tending to show the violent and dangerous character of the deceased. On the contrary a large amount of such evidence was allowed *in* and the jury was instructed in regard thereto. The transcript of evidence shows that the defendant testified without objection that the deceased had always had a bad feeling towards him during their six months' acquaintance, that he had abused him frequently, that on different occasions he had struck him with his fist, spit on him, chased him with a big knife and threatened to take his life, that he was afraid the deceased would take his life, that he knew the reputation of the deceased in the community for being a violent and dangerous man and that it was bad; and that several witnesses, called on behalf of the defendant, testified that the reputation of deceased for
58 being a violent, dangerous, vindictive and revengeful man was very bad. We fail to see that any harm resulted to defendant by reason of the refusal to allow the questions to be answered. Defendant was allowed to introduce evidence tending to show all material matters covered by the questions. The view taken by us renders it necessary to refer to any of the cases cited by defendant.

The other assignments of error are not argued by defendant in his brief and are not apparently relied on. One of them has already been passed upon by this court in Territory *v.* Morita Kaizo, 17 Haw. 295.

The judgment of the lower court is affirmed.

F. W. Milverton, Deputy Attorney General, for plaintiff.

Carl S. Smith for defendant.

59 EXHIBIT "C."

In the Supreme Court of the Territory of Hawaii, at the October Term, A. D. 1905.

THE TERRITORY OF HAWAII, Defendant in Error,
vs.
MORITA KAIZO, Plaintiff in Error.

On Writ of Error to the Fourth Circuit Court.

Brief of the Plaintiff in Error.

May it please the Court:

The assignments of error numbered from 3 to 8, both inclusive, fairly bring before this Court questions of law relative to the admissibility of evidence which are very closely related in principle and which are found treated together in the books on evidence and

on homicide. This enables the defendant to urge his points by following the usual subdivision found in text books instead of following the assignments of error specifically.

At the trial of the cause the defendant made no attempt to deny the killing of the deceased; his only defense consisted in a justification of the killing upon the claim that he acted in self-defense and under such a fear of the deceased that the killing was justifiable. This question of self-defense the defendant offered to the jury for their consideration and as a part of the surrounding circumstances, and for the purpose of showing his fear of the deceased, he attempted to show in evidence the following evidential facts:

60 I. The reputation of the deceased in the Japanese community where both the deceased and defendant lived, by which the community was in fear of the deceased. (Assignment 4.)

II. The character of the deceased for viciousness, combativeness, turbulence, vindictiveness and other desparate and dangerous traits, by showing that at sometime before the killing the deceased had attacked one, Kobataki, which attack was known to the defendant at the time of the killing. (Assignment 5.)

III. The character of the deceased for the desparate traits enumerated above, by showing that the deceased had told the defendant of his own acts of violence. (Assignment 6.)

IV. The violent character of the deceased known to the defendant at the time of the killing and previous thereto. (Assignment 7.)

V. The character of the deceased for violence prior to the time of the killing by showing certain specific acts of violence committed by the deceased and known to the defendant. (Assignment 8.)

All of these attempts by defendant to show the desparate character of the deceased and that deceased was generally known in the Japanese community to be a man of violence and that the Japanese community generally was in fear of him and that the specific acts of violence committed by the deceased showed him a man worthy to be feared, all of which was known to the defendant, were defeated by the rulings of the court, as shown by the assignments of error. These rulings, directed as they are to the great number of attempts on the part of the defendant to establish the dangerous character of the deceased, could only have been made by the trial court under

61 the view that no such evidence is admissible at a trial for homicide where self-defense is an issue. Such a view the court undoubtedly held, as taken from the rulings during the trial and such a view is unquestionably erroneous.

By the defendant's position taken by him before the jury he plainly submitted, as an issue in the trial, the fact that he was attacked by the deceased and was in mutual combat with him after the original attack. Inasmuch as the intent and mental attitude of the defendant was the most material fact in the trial of the cause and a determination of that intent and mental attitude was necessary before the defendant could be found guilty of any crime or be found guilty of any of the degrees of homicide less than murder in the first degree, it was therefore a most relevant and material inquiry to know

the fear in which the defendant held the deceased at the time of the killing.

Wigmore on Ev. Sec. 246.

It is true that the earlier decisions of the courts have shown a considerable confusion in dealing with the question of the admissibility of such evidence by failing to assign to such evidence its proper function. It was formerly thought that without regard to whether self-defense was in issue, the character of the deceased was an immaterial inquiry, the courts basing their conclusion upon the general proposition that the jury might be led to believe that because the deceased had a vicious character his untimely taking off at the hands of the defendant could not be said to be criminal. Similarly it was held that evidence of particular acts of the deceased showing his naturally vicious character was inadmissible on the ground that generally character cannot be established by evidence of specific acts.

62 St. *v.* Field, 14 Me. 244;
Com. *v.* York, 9 Met. 93;
Com. *v.* Hilliard, 2 Gray 295.

The more careful consideration of the courts has brought about a refusal to follow the earlier decisions and it is doubtful if we shall find a single authority in the future which will give any countenance to the former rulings. Until last year the law of the State of Massachusetts was as announced above, but a unanimous decision of the Supreme Court of that state now takes a more enlightened view specifically overruling the former holding.

Com. *v.* Tircinski, 75 N. E. 261;
Com. *v.* Tircinski, 2 L. R. A. (N. S.) 102.

So also in the State of Wisconsin.

St. *v.* Nett. 50 Wis. 524.

The character of the deceased for violence, turbulence, vindictiveness and other desperate and dangerous traits, is admissible in evidence upon a trial for homicide where the defendant attempts to justify the killing upon the theory of self-defense.

Wigmore: Ev. Sec. 246.
Wharton: Crim. Ev. Sec. 69 *et seq.*
Com. *v.* Tircinski, 75 N. E. 261;
Com. *v.* Tircinski, 2 L. R. A. (N. S.) 102;
Hurd *v.* People, 25 Mich. 405;
Upthegrove *v.* St. 37 Oh. St. 662;
Smith *v.* U. S., 161 U. S. 85;
Wiggins *v.* U. S. 93 U. S. 465;
Marts *v.* St. 26 Oh. St. 162;
St. *v.* Nett, 50 Wis. 524;
Kipley *v.* People, 74 N. E. 382;
St. *v.* Thrailkil, 88 S. W. 341;
Orange *v.* St. 83 S. W. 383;
Bolus *v.* St. 28 N. E. 1115;
5 Enc. 2nd. ed. 872 and notes.

If the deceased's general character, his threats against the defendant, the size and strength of his limbs his capacity to overcome his enemy in combat, the apparent rage and frenzy at the time of the assault, are all admissible in evidence as the books certainly
63 agree that they are, it is not entirely evident why particular acts of violence done by deceased before the time of the killing and which acts of violence are known to the defendant, is not also admissible. The character of the deceased is not in evidence in the same sense that the character of a person is in evidence upon an action for libel. For the purpose of evidence of character in a prosecution for homicide is to show the mental attitude of the defendant, his fear that the deceased will immediately do him great bodily harm unless stopped, therefore the facts known to the defendant of the desparate nature of the deceased are most potent in giving to the jury the evidence from which they can rightly see what was the defendant's intent at the time he compassed the death of his assailant. According to the ordinary reasoning, the defendant, knowing of his own knowledge, that the deceased had sometime before the encounter, engaged in other encounters and the fact that those other encounters were disastrous to the persons attacked by deceased, certainly would have as great an effect upon the mind of the defendant in producing a condition of fear as any knowledge on his part of the deceased's generally dangerous character. The most luminous and convincing treatise which has yet been produced upon the law of evidence certainly makes it clear, both from authority and from reasoning, that evidence of specific acts of violence is admissible.

Wigmore: Ev. Sec. 248 p. 318.

"The state of the law in more recent times has come on the whole to favor the admissibility of such facts."

Ibid.

Boyle *vs.* St., 97 Ind. 322.

Respectfully submitted,

(Sgd.) CARL S. SMITH,
Attorney for Plaintiff in Error.

Hilo, Hawaii, August 21st, 1906.

64 Endorsed: Supreme Court Territory of Hawaii. October Term, 1906. Session, 190-. *Ex parte:* In the Matter of the Petition of Morita Kaizo for a Writ of *Habeas Corpus.* Return of William Henry, High Sheriff of the Territory of Hawaii. Filed January 17, 1907, at 9:55 A. M. J. A. Thompson, Clerk. E. C. Peters, Atty. Gen'l. For High Sheriff.

65 In the Supreme Court of the Territory of Hawaii, October Term, A. D. 1906.

Ex Parte: In the Matter of the Petition of MORITA KEIZO for a Writ of *Habeas Corpus.*

Judgment.

This matter having come on to be heard this 17th day of January, A. D. 1907, before the Supreme Court of the Territory of Hawaii, upon the petition and the return of the High Sheriff of said Territory to the Writ of *Habeas Corpus;*

It is now considered and adjudged by the said Supreme Court that the Writ of *Habeas Corpus* heretofore issued in this matter be and the same is hereby discharged and further that the petitioner be remanded to the custody of said William Henry High Sheriff aforesaid.

By the Court:

[SEAL.] (S'g'd) J. A. THOMPSON, *Clerk.*

Endorsed: Supreme Court Territory of Hawaii. October Term A. D. 1906. *Ex Parte.* In the Matter of the Petition of Morita Keizo for a Writ of *Habeas Corpus.* Judgment. Filed January 17, 1907 at 11 A. M. J. A. Thompson, Clerk Supreme Court.

66 UNITED STATES OF AMERICA:

In the Supreme Court of the Territory of Hawaii, October Term, A. D. 1906.

Ex Parte: In the Matter of the Petition of MORITA KEIZO for a Writ of *Habeas Corpus.*

Petition for a Writ of Error.

To the Honorable Walter F. Frear, Chief Justice of the Supreme Court of the Territory of Hawaii:

The petition of Morita Keizo respectfully shows that on the 17th day of January, A. D. 1907, the Supreme Court of the Territory of Hawaii rendered a final judgment in the above entitled matter discharging the writ of *Habeas Corpus* issued therein by the said Supreme Court on the 16th day of January, A. D. 1907, and remanding your petitioner to the custody of William Henry, As High Sheriff of the Territory of Hawaii, as will appear by reference to the record and proceedings in the aforesaid matter, and that the said Supreme Court is the highest court of said Territory in which a decision and judgment in said matter could be had.

And your petitioner demands the right to remove said judgment and the record and proceedings in said matter to the Supreme Court

of the United States by writ of error, for that there was drawn in question on the hearing of the said matter in the said Supreme Court of the Territory of Hawaii, the construction of section 2165
67 of the Revised Statutes of the United States, and section 83 of a certain act of the Congress of the United States, entitled, "An Act to provide a Government for the Territory of Hawaii," approved April 30th, A. D., 1900 (31 Stats. ch. 339) and the Fifth Amendment to the Constitution of the United States; and that the decision and judgment of the said Supreme Court of the Territory of Hawaii, was against the rights, privileges and immunities specifically set forth and demanded by your petitioner under the laws of the United States, above cited, and under the said Fifth Amendment to the Constitution of the United States, as appears by the record of the proceedings in said matter in said Supreme Court, which is herewith submitted.

Your petitioner further alleges that he is confined by William Henry, as High Sheriff of the Territory of Hawaii, in the Territorial Penitentiary at Honolulu, on a conviction of murder in the first degree in the Circuit Court of the Fourth Judicial Circuit of the Territory of Hawaii and that your petitioner is under sentence of death for said crime and that a death warrant has been issued and is in the hands of the said William Henry, High Sheriff aforesaid, commanding him to execute the said death sentence on your petitioner on the 22nd day of January, A. D. 1907, and that the petition for a Writ of *habeas corpus* was filed by your petitioner in the aforementioned matter in the Supreme Court, to procure his release from the custody of said William Henry as High Sheriff aforesaid and to have the said conviction and sentence annulled; that it is the intention of the said William Henry, High Sheriff as aforesaid, to execute the said death sentence as directed by the said death warrant.

Wherefore your petitioner prays the allowance of a writ of error returnable into the Supreme Court of the United States and
68 for a citation, also that an appropriate order may be made directed to the said William Henry High Sheriff as aforesaid, commanding him to surcease, desist and refrain from executing the said death warrant on your petitioner pending the final determination of the proceedings under the writ of error herein prayed for, and that the bond for costs on these proceedings in error may be fixed.

(S'g'd) MORITA KEIZO, *Petitioner.*

(S'g'd) A. S. HUMPHREYS, *Counsel.*

Let the Writ of Error issue as prayed. The bond for costs is hereby fixed in the sum of Two Hundred and Fifty Dollars.

[SEAL.] (S'g'd) W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Dated this 17th day of January, A. D. 1907.

Endorsed: United States of America. In the Supreme Court of the Territory of Hawaii. *Ex Parte:* In the Matter of the petition of Morita Keizo for a Writ of *Habeas Corpus.* Petition for a Writ of Error. Filed January 17, 1907 at 11:7 o'clock A. M. J. A. Thompson, Clerk Supreme Court.

69 UNITED STATES OF AMERICA:

In the Supreme Court of the Territory of Hawaii, October Term, A. D. 1906.

Ex Parte: In the Matter of the Petition of MORITA KEIZO for a Writ of *Habeas Corpus.*

Assignment of Errors.

And now comes the plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the Territory of Hawaii in the above entitled matter, there is manifest error in this, to-wit:

First. The said Supreme Court of the Territory of Hawaii erred in discharging the writ of *habeas corpus* in said matter and in remanding the petitioner in error to the custody of William Henry, High Sheriff of the Territory of Hawaii;

Second. The said Supreme Court of the Territory of Hawaii erred in not ordering the petitioner in error discharged from the custody of the said William Henry, High Sheriff of the Territory of Hawaii, and in not rendering a decision, order and judgment that the indictment under which petitioner in error was tried and his conviction thereunder, and the sentence and mittimus under which he is held by the said William Henry, High Sheriff of the Territory of Hawaii, each and all of them null and void;

70 *Third.* The said Supreme Court of the Territory of Hawaii erred in holding that the eight persons particularly named in the petition for a writ of habeas corpus herein, to-wit, F. B. C. de Mello, B. da Camara, Jr., L. S. Canario, Jules C. Carvalho, J. P. Fernandes, Jr., M. F. Spinola, G. Seitz and E. Soper, were competent to serve as Grand Jurors of the Grand Jury which found and presented the aforesaid indictment against said petitioner in error, and in not holding that the said eight persons were aliens and incompetent to serve as members of the aforesaid Grand Jury under Section 83 of the Organic Act of Hawaii and under sections 1770 and 1771 of the Revised Laws of Hawaii, 1905.

Fourth. The said Supreme Court of the Territory of Hawaii erred in not holding that the said Circuit Court of the Fourth Judicial Circuit of the Territory of Hawaii was without jurisdiction to try the petitioner in error under the aforesaid indictment, and in not holding and adjudging that his trial and conviction and sentence in said Circuit Court of the Fourth Judicial Circuit of the Territory of

Hawaii was without due process of law, under the Fifth Amendment of the Constitution of the United States.

Fifth. The said Supreme Court of the Territory of Hawaii erred in holding that the said Circuit Court of the Fourth Judicial Circuit of the Territory of Hawaii had jurisdiction to naturalize aliens under section 2165 of the Revised Statutes of the United States, and in holding that the said trial, conviction and sentence was due process of law within the meaning of said Fifth Amendment to the Constitution of the United States.

Sixth. The said Supreme Court of the Territory of Hawaii erred in not holding and adjudging that the aforesaid trial, con-
71 viction and sentence of petitioner in error was in contravention of his right, privilege and immunity under the Fifth Amendment to the Constitution of the United States, namely, the right, privilege, immunity and exemption of being held to answer for a capital crime, to-wit, murder in the first degree, unless on a presentment or indictment of a Grand Jury.

Seventh. The said Supreme Court of the Territory of Hawaii erred in not holding and adjudging that petitioner was not presented or indicted by a Grand Jury within the meaning of the said Fifth Amendment to the Constitution of the United States, and in holding and adjudging that petitioner in error was indicted by a Grand Jury within the meaning of said amendment to the Constitution of the United States.

Eighth. The said Supreme Court of the Territory of Hawaii erred in not adjudging that all proceedings had and taken in said Circuit Court of the Fourth Judicial Circuit of the Territory of Hawaii against petitioner in error were null and void under section 2165 of the Revised Statutes of the United States, under section 83 of the Organic Act of Hawaii (31 Stats., 141 ch. 339) and under sections 1770 and 1771 of the Revised Laws of Hawaii, 1905.

And the petitioner in error sayeth that all of the aforesaid errors appear upon the record in the above entitled matter and in the decision and judgment of said Supreme Court of the Territory of Hawaii and the said Morita Keizo, plaintiff, in error, prays that the judgment of said Supreme Court of the Territory of Hawaii for the aforesaid errors and for other errors manifest in said record and proceedings may be reversed annulled and held for naught; and that plaintiff in error may be restored to all things which he has lost by reason of said judgment.

Dated January 17th, 1907.

(S'g'd) MORITA KEIZO,
Petitioner in Error.

72 Endorsed: United States of America. In the Supreme Court of the Territory of Hawaii. *Ex Parte:* In the Matter of the Petition of Morita Keizo for a Writ of *Habeas Corpus.* Assignment of Errors. Filed January 17, 1907 at 11:7 o'clock A. M. J. A. Thompson, Clerk Supreme Court.

73 UNITED STATES OF AMERICA:

In the Supreme Court of the Territory of Hawaii, October Term, A. D. 1906.

Ex Parte: In the Matter of the Petition of MORITA KEIZO for a Writ of *Habeas Corpus.*

Bond.

Know all men by these presents, that we Morita Keizo as Principal and Goo Wan Hoy as surety are held and firmly bound unto William Henry, High Sheriff of the Territory of Hawaii, and his assigns in the full sum of Two Hundred and Fifty Dollars, for the payment of which well and truly to be made to the said obligee, his successors and assigns, we do bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed and dated this 17th day of January, A. D. 1907.

The condition of the foregoing obligation is such that whereas: in the matter of the petition for a writ of *habeas corpus* depending in the Supreme Court of the Territory of Hawaii, wherein the above bounden Morita Keizo was the petitioner and William Henry, High Sheriff of the Territory of Hawaii was the respondent, judgment was rendered against the said petitioner, and the said petitioner having obtained a writ of error and filed a true copy thereof in the office of the Clerk of the Supreme Court of the Territory of Hawaii,

74 to reverse the judgment in the aforesaid matter, and a citation having issued directed to the said William Henry, High Sheriff of the Territory of Hawaii, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington in the District of Columbia:

Now then: if the said Morita Keizo shall prosecute his said writ of error to effect and answer and pay all costs and damages if he shall fail to make good his plea, then the above obligation shall be void, otherwise to remain in full force and virtue.

(S'g'd) MORITA KEIZO. [SEAL.]
(S'g'd) GOO WAN HOY. [SEAL.]

Signed in the presence of
(S'g'd) WM. HENRY.

Approved:
(S'g'd) W. F. FREAR,
Chief Justice Supreme Court,
Territory of Hawaii.

Endorsed: United States of America. In the Supreme Court of the Territory of Hawaii. *Ex Parte:* In the Matter of the Petition of Morita Keizo for a Writ of *Habeas Corpus.* Bond. Filed January 17, 1907 at 11:56 o'clock A. M. J. A. Thompson, Clerk.

75 UNITED STATES OF AMERICA:

In the Supreme Court of the Territory of Hawaii, October Term, A. D. 1906.

Ex Parte: In the Matter of the Petition of MORITA KEIZO for a Writ of *Habeas Corpus.*

(Stamp $2.00.)

Supersedeas.

The Territory of Hawaii to William Henry, High Sheriff of the Territory of Hawaii, Greeting:

Whereas, Morita Keizo, has filed a petition for a writ of error to remove the judgment and the record and proceedings in the above entitled matter to the Supreme Court of the United States, and whereas said petition for a writ of error as aforesaid has been allowed and the bond of costs on said writ of error has been fixed at the sum of Two Hundred and Fifty Dollars, and whereas the said bond for costs has been duly given and the same approved, and whereas it is represented to us in said petition for a writ of error that the respondent in the said matter, to wit, William Henry, High Sheriff of the Territory of Hawaii, has in his hands a death warrant for the execution of the said petitioner on the 22nd day of January, A. D. 1907, therefore these are to command you the said William Henry,
76 High Sheriff of the Territory that you do absolutely surcease, desist and refrain from the execution of the said death warrant until the final determination of the proceedings under said writ of error.

Witness the Honorable W. F. Frear, Chief Justice of the Supreme Court of the Territory of Hawaii, this 17th day of January, A. D. 1907.

[SEAL.] (S'g'd) J. A. THOMPSON, *Clerk.*

Let the above writ issue.

(S'g'd) W. F. FREAR,
Chief Justice Supreme Court,
Territory of Hawaii.

Honolulu, Jan. 17, 1907.

Service of a copy of the within Supersedeas this day admitted. Dated Honolulu Jany. 17th, 1907.

(S'g'd) WM. HENRY,
High Sheriff Territory of Hawaii.

Endorsed: United States of America. In the Supreme Court of the Territory of Hawaii. *Ex Parte:* In the Matter of the Petition of Morita Keizo for a Writ of *Habeas Corpus.* Supersedeas. Filed and Issued January 17 1907 at 11:55 o'clock A. M. J. A. Thompson, Clerk. Return January 17, 1907 at 2:20 P. M. J. A. Thompson, Clerk.

77 UNITED STATES OF AMERICA:

In the Supreme Court of the Territory of Hawaii, October Term, A. D. 1906.

Ex Parte: In the Matter of the Petition of MORITA KEIZO for a Writ of *Habeas Corpus.*

Clerk's Certificate.

I, J. A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, do hereby certify that true copies of the petition for a Writ of Error, the Writ of Error, Bond for Costs and Assignment of Errors, with the endorsements thereon, were on this the 17th day of January A. D. 1907, lodged in the office of the Clerk of the Supreme Court of the Territory of Hawaii, by the plaintiff in error, Morita Keizo, for the defendant in error, William Henry, High Sheriff of the Territory of Hawaii.

In Witness Whereof I hereto set my hand and affix the seal of said Supreme Court, this the said 17th day of January, A. D. 1907.

[SEAL.] (Signed) J. A. THOMPSON,
Clerk of the Supreme Court, Territory of Hawaii.

Endorsed: United States of America. In the Supreme Court of the Territory of Hawaii. *Ex Parte:* In the Matter of the Petition of Morita Keizo for a Writ of *Habeas Corpus.* Certificate. Filed January 17, 1907 at 1:50 P. M. J. A. Thompson, Clerk.

78 *Citation.*

United States of America to William Henry, High Sheriff of the Territory of Hawaii, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington in the District of Columbia, within sixty days from the date of this writ pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the Territory of Hawaii wherein Morita Keizo is plaintiff in error and you, William Henry, High Sheriff of the Territory of Hawaii are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. F. Frear, Chief Justice of the Supreme Court of the Territory of Hawaii, this 17th day of January, A. D. 1907.

[Seal Supreme Court, Territory of Hawaii.]

W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Service of a copy of the within citation this day admitted.
Dated Honolulu, Jan'y 17 1907.

WM. HENRY,
High Sheriff Territory of Hawaii.

79 [Endorsed:] United States of America. In the Supreme Court of The Territory of Hawaii. *Ex Parte:* In the Matter of the Petition of Morita Keizo for a Writ of *Habeas Corpus.* Citation. Filed and issued January 17, 1907, at 11:58 o'clock A. M. J. A. Thompson, clerk. Returned January 17, 1907, at 2:20 P. M. J. A. Thompson, clerk.

80 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the Territory of Hawaii, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the Territory of Hawaii, before you or some of you, being the highest court of law or equity of the said Territory in which a decision could be had in the matter of the petition of Morita Keizo for a writ of *habeas corpus*, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said Territory on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission had under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Morita Keizo, as by his complaint appears. We being willing that error, if any hath been, should be corrected, and full
81 and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within sixty days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

said Supreme Court the 17th day of January, in the Year of our Lord, One Thousand Nine Hundred and Seven.

J. A. THOMPSON,
Clerk of the Supreme Court of the Territory of Hawaii.

Allowed:
W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

82 [Endorsed:] United States of America. In the Supreme Court of The Territory of Hawaii. *Ex Parte:* In the Matter of the Petition of Morita Keizo for a Writ of *Habeas Corpus.* Writ of Error. Filed January 17, 1907, at 11:57 o'clock A. M. J. A. Thompson, clerk.

83 UNITED STATES OF AMERICA:

Supreme Court of the Territory of Hawaii, October Term, A. D. 1906.

Ex Parte: In the Matter of the Petition of MORITA KEIZO for a Writ of *Habeas Corpus.*

Clerk's Certificate to Transcript.

I, J. A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, do hereby — that the foregoing pages numbered 1 to 77 inclusive, contain full, true, correct and complete copies of all of the pleadings, record, entries and final judgment in the above entitled matter in the Supreme Court of the Territory of Hawaii and on proceedings in error in the Supreme Court of the United States, as full, true and complete as the same remain on file and of record in my office as Clerk of said Supreme Court of the Territory of Hawaii.

I do further certify that the original Citation in Error with the acknowledgment of service thereon and the original Writ of Error are hereto attached and herewith returned, and that I make this certificate in obedience to the command of said Writ of Error and as my return thereto.

In testimony whereof, I hereunto subscribe my name and affix the Seal of the Supreme Court of the Territory of Hawaii, this the twenty first day of January, A. D. 1907.

[Seal Supreme Court, Territory of Hawaii.]

J. A. THOMPSON,
Clerk Supreme Court, Territory of Hawaii.

Endorsed on cover: File No. 20,584. Territory of Hawaii, supreme court. Term No. 241. Morita Keizo, plaintiff in error, *vs.* William Henry, high sheriff of the Territory of Hawaii. Filed February 20th, 1907. File No. 20,584.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 27.

MORITA KEIZO, PLAINTIFF IN ERROR,

vs.

WILLIAM HENRY, HIGH SHERIFF OF THE TERRITORY OF HAWAII.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR THE PLAINTIFF IN ERROR.

Statement of the Case.

The fundamental question presented for decision in this case is whether or not the Circuit Courts of the Territory of Hawaii had jurisdiction to pronounce judgments of naturalization upon aliens between June 14, 1900, the date when the Organic Act of the Territory of Hawaii took effect, and the first day of August, 1905, in which month the plaintiff in error was indicted for murder in the Circuit Court of the fourth circuit in the Territory of Hawaii.

This question arises in this wise:

Morita Keizo, the plaintiff in error, a Japanese residing in Hilo in the island of Hawaii, was indicted on August 21,

1905, for the crime of murder in the first degree by a grand jury drawn for the August term of the Circuit Court of the fourth judicial circuit, held at Honokaa in the island of Hawaii, such indictment being presented and filed in said Circuit Court on August 22, 1905.

Record, 6 and 12.

On August 24, 1905, Morita Keizo filed a plea in abatement (Record, 8), assigning as a reason that of the sixteen members of the grand jury who had found a bill against him, eight were foreign born and were not citizens of the United States of America nor of the territory of Hawaii, and hence were ineligible and incompetent to act as grand jurors.

On the same day the Deputy Attorney General filed a joinder to the plea in abatement.

Record, 9.

The questions of law involved were certified by the presiding judge to the Supreme Court of the Territory of Hawaii on November 23, 1905, as follows:

> "1st. Had the Circuit Court of the Fourth Circuit, Territory of Hawaii, between June 14th, 1900, and August 1st, 1905, jurisdiction to pronounce judgments of naturalization upon the eight aliens whose names are set forth in defendant's amended plea in abatement?
>
> "2nd. Was the grand jury of this circuit impanelled and sworn for the August, 1905, term of this court, comprising sixteen members, eight of whom were naturalized as aforesaid, a legal body under the laws of this Territory and competent to find a legal indictment against the defendant?
>
> "3rd. Shall the defendant be held to answer the indictment thus found by said grand jury?"
>
> Record, 12.

The judgment of the Supreme Court was given on January 3, 1906. Each of the three justices of the Supreme

Court rendered an independent opinion. The opinion of the Court is by Justice Wilder, who answered the three reserved questions in the affirmative. (Record, 13.) Chief Justice Frear concurred in the result, but reached his conclusion by a different line of argument. (Record, 16.) Justice Hartwell wrote a dissenting opinion. (See 17 Hawaiian Reports, 302.) This opinion is printed as Appendix A of this brief, page 37.

At the trial, the judge overruled the plea in abatement, to which exception was taken and allowed on March 12, 1906. (Record, 17-19.)

Keizo was tried, pleading self defense, (Record, 30) and was found guilty of the crime of murder in the first degree, and was sentenced to death on March 22, 1906. (Record, 19.)

Thereafter, on July 11, 1906, Keizo presented a petition for a writ of error to the Supreme Court of the territory, assigning as the first of the errors the overruling of his plea in abatement. (Record, 26-29.)

The judgment of the lower court was affirmed by the Supreme Court on October 23, 1906. The same justices heard the cause as before, and cited on this particular question their previous decision. (Record, 30.)

Death warrant was issued by the governor of the Territory on January 8, 1907, commanding William Henry, the High Sheriff of the Territory of Hawaii, to execute the sentence of death on January 22, 1907. (Record, 20.)

Thereupon Keizo filed a petition for a writ of *habeas corpus* on January 16, 1907, (Record, 1) which was heard on the following day by the Supreme Court of the Territory, and the writ discharged. (Record, 35.)

Thereupon, on the same day, January 17, 1907, a petition for a writ of error to the Supreme Court of the United States was filed and issued. (Record, 37-43.)

The petition for writ of error to this Court contains the following—

SPECIFICATION OF ERRORS.

First. The said Supreme Court of the Territory of Hawaii erred in discharging the writ of *habeas corpus* in said matter and in remanding the petitioner in error to the custody of William Henry, High Sheriff of the Territory of Hawaii.

Second. The said Supreme Court of the Territory of Hawaii erred in not ordering the petitioner in error discharged from the custody of the said William Henry, High Sheriff of the Territory of Hawaii, and in not rendering a decision, order and judgment that the indictment under which petitioner in error was tried and his conviction thereunder, and the sentence and mittimus under which he is held by the said William Henry, High Sheriff of the Territory of Hawaii, each and all of them null and void.

Third. The said Supreme Court of the Territory of Hawaii erred in holding that the eight persons particularly named in the petition for a writ of *habeas corpus* herein, to-wit, F. B. C. de Mello, B. da Camara Jr., L. S. Canario, Jules C. Carvalho, J. P. Fernandez, Jr., M. F. Spinola, G. Seitz and E. Soper, were competent to serve as Grand Jurors of the Grand Jury which found and presented the aforesaid indictment against said petitioner in error, and in not holding that the said eight persons were aliens and incompetent to serve as members of the aforesaid Grand Jury under section 83 of the Organic Act of Hawaii and under sections 1770 and 1771 of the Revised Laws of Hawaii, 1905.

Fourth. The said Supreme Court of the Territory of Hawaii erred in not holding that the said Circuit Court of the Fourth Judicial Circuit of the Territory of Hawaii was without jurisdiction to try the petitioner in error under the aforesaid indictment, and in not holding and adjudging that his trial and conviction and sentence in said Circuit Court of the Fourth Judicial Circuit of the Territory of Hawaii was

without due process of law, under the Fifth Amendment of the Constitution of the United States.

Fifth. The said Supreme Court of the Territory of Hawaii erred in holding that the said Circuit Court of the Fourth Judicial Circuit of the Territory of Hawaii had jurisdiction to naturalize aliens under section 2165 of the Revised Statutes of the United States, and in holding that the said trial, conviction and sentence was due process of law within the meaning of said Fifth Amendment to the Constitution of the United States.

Sixth. The said Supreme Court of the Territory of Hawaii erred in not holding and adjudging that the aforesaid trial, conviction and sentence of petitioner in error was in contravention of his right, privilege and immunity under the Fifth Amendment to the Constitution of the United States, namely, the right, privilege, immunity and exemption of being held to answer for a capital crime, to-wit, murder in the first degree, unless on a presentment or indictment of a Grand Jury.

Seventh. The said Supreme Court of the Territory of Hawaii erred in not holding and adjudging that petitioner was not presented or indicted by a Grand Jury within the meaning of the said Fifth Amendment to the Constitution of the United States, and in holding and adjudging that petitioner in error was indicted by a Grand Jury within the meaning of said amendment to the Constitution of the United States.

Eighth. The said Supreme Court of the Territory of Hawaii erred in not adjudging that all proceedings had and taken in said Circuit Court of the Fourth Judicial Circuit of the Territory of Hawaii against petitioner in error were null and void under section 2165 of the Revised Statutes of the United States, under section 83 of the Organic Act of Hawaii (31 Stats., 141 ch. 339), and under sections 1770 and 1771 of the Revised Laws of Hawaii, 1905.

Record, 37-38.

ARGUMENT.

The fundamental question in this case is as to the jurisdiction of the Circuit Courts of the Territory of Hawaii to naturalize aliens.

The pertinent facts are determined by the following stipulation:

> "It is stipulated and agreed by and between the parties hereto that the following facts are true and shall be considered as proved for all the purposes of this case:
>
> "1. That the said defendant was not committed to the grand jury for the August Term, 1905, and neither said defendant nor his counsel knew or had reason to know that the said grand jury would hear or consider evidence in the above entitled case until after the said grand jury was sworn to act as such grand jury at this term:
>
> "2. That of the grand jurors summoned and sworn at the said term only 16 heard and considered evidence against said defendant and only 16 of such jurors as set forth in the defendant's amended plea in abatement found a true bill against said defendant:
>
> "3. That of the said grand jurors, eight thereof, as named in said amended plea in abatement (on page 2) were foreign born and of alien parentage and were never naturalized and never did become citizens of the United States of America except as they may have become naturalized in the following manner, to wit: That at sometime between June 14, 1900, and August 1, 1905, each of the said eight grand jurors being entitled to naturalization, applied for a judgment of naturalization to the Circuit Court of the Fourth Circuit, Territory of Hawaii, and upon such applications the said Court pronounced upon each of the said applicants a judgment of naturalization.
>
> "Honokaa, August 31, 1905."
>
> Record, 10.

It is conceded that, unless these Circuit Courts had jurisdiction to naturalize, eight of the sixteen grand jurymen who joined in the indictment were not citizens and hence were incompetent to sit on the grand jury. If this be correct, there was no valid indictment, since section 83 of the Organic Act, approved April 30, 1900, requires that the "number of grand jurors in each Circuit shall be not less than thirteen" and that "no person who is not a male citizen of the United States, and twenty-one years of age * * * shall be a qualified juror or grand juror in the Territory of Hawaii."

31 Stats., 157.

These provisions are incorporated in the Revised Laws of Hawaii, in force February 1, 1905, at pages 692-3, under the title "Juries and trial by Jury" in the following language:

> "SEC. 1770. QUALIFIED WHEN.—A person is qualified to act as a juror:
> "1. If he is a male citizen of the United States and of the Territory of Hawaii, of the age of twenty-one years, and possesses the qualifications of a voter and is a resident of the circuit from which he is selected;
> "SEC. 1771. DISQUALIFIED WHEN.—A person is not competent to act as a juror:
> "1. Who does not possess the qualifications prescribed by the preceding section;

NATURALIZATION JURISDICTION.

If the Circuit Courts of Hawaii had the power to naturalize subsequent to the Organic Act of April 30, 1900, and before the indictment of Keizo on August 21, 1905, it must be by virtue of the Organic Act itself or by the general statutes of the United States. In the Republic of Hawaii, naturalization jurisdiction had been determined by Article 18 of the Constitution of the Republic, and was vested exclusively in the Justices of the Supreme Court, as follows:

"Article 18. NATURALIZATION.—SECTION 1. The naturalization of aliens shall be exclusively within the jurisdiction of the Justices of the Supreme Court."
Civil Laws of the Hawaiian Islands, 1897, page 7.

The procedure before the Justices of the Supreme Court was regulated by chapter 102 of the civil laws of the Republic. The Organic Act of April 30, 1900, repealed the entire Constitution of the Republic of Hawaii, and also chapter 102 on Naturalization, by the following provision:

"SEC. 7. That the Constitution of the Republic of Hawaii and the laws of Hawaii, as set forth in the following acts, chapters, and sections of the civil laws, penal laws, and session laws, and relating to the following subjects are hereby repealed:
"CIVIL LAWS: * * * last clause of first subdivision and fifth subdivision of section eleven hundred and forty-four, first subdivision of section eleven hundred and forty-five, Jurisdiction; * * * chapter one hundred and two, Naturalization;" * * *
31 Stats., 142. See foot note.

NOTE.—The purport of these repealed clauses is shown by italics in the following extracts from sections 1144 and 1145 of the Civil Laws of the Republic:

§ 1144. The several Circuit Courts shall have jurisdiction, but subject to appeal and exceptions to the Supreme Court, according to law, as follows:

First. Of all offenses and crimes cognizable under the authority of the Hawaiian laws, committed within their respective Circuits or transferred to them for trial by change of venue from some other Circuit Court, *or committed on the high seas;*

Fifth. Of all suits or proceedings against Ambassadors or other Public Ministers, their attaches or servants as far as any Court can have consistently with the Law of Nations and the Hawaiian Treaties, and such jurisdiction shall be exclusive;

§ 1145. The Judges of the several Circuit Courts shall have power in Chambers within their respective jurisdic-

The Organic Act extended the Constitution of the United States to the Territory of Hawaii, as follows:

> "SEC. 5. That the Constitution, and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States: Provided, That sections eighteen hundred and fifty and eighteen hundred and ninety of the Revised Statutes of the United States shall not apply to the Territory of Hawaii."
>
> 31 Stats., 141.

Hence, the jurisdiction to naturalize must be found either in the provisions of the Organic Act or in the general statutes of the United States, since the Constitution of the United States, section 8, paragraph 4 of Article 1, declares:

> "The Congress shall have power,—
> "4. To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States."

The Organic Act of April 30, 1900, does not in itself confer naturalization jurisdiction upon any of the Hawaiian courts. Such jurisdiction as the Hawaiian courts may possess is dependent upon the general statutes of the United States. The statutory provision conferring naturalization jurisdiction upon the courts which was in force during the period in question is contained in section 2165 of the Revised Statutes, that section being as follows:

> "SEC. 2165. An alien may be admitted to become a citizen of the United States in the following manner, and *not otherwise:*

---

tions, but subject to appeal to the Circuit and Supreme Courts according to law, as follows:

First. To hear and determine all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a remedy at law, where such remedy exists.

> First. He shall declare on oath, before a circuit or district court of the United States, *or a district or supreme court of the Territories*, or a court of record of any of the States having common-law jurisdiction, and a seal and clerk, two years, at least, prior to his admission, that it is *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject."

Under this section the Supreme Court of Hawaii has naturalization jurisdiction, and, hence, the only Court which is comparable to the Supreme Court of the Republic, which alone had naturalization jurisdiction under the Constitution of the Republic of Hawaii, has the same jurisdiction in the Territory under the Revised Statutes.

In addition, the Federal Court established by section 86 of the Organic Act of April 30, 1900, has naturalization jurisdiction, the pertinent portions of that section being as follows:

> "SEC. 86. That there shall be established in the said Territory a District Court, to consist of one judge, who shall reside therein, and be called the District judge. * * * Said court shall have, in addition to the ordinary jurisdiction of District Courts of the United States, jurisdiction of all cases cognizable in a Circuit Court of the United States." * * *
>
> 31 Stats., 158.

Thus, under the Revised Statutes, more opportunity is given to naturalize foreigners than had been given by the laws of the Republic of Hawaii. No one was deprived, by the Organic Act creating the Territory, of a privilege that he had theretofore possessed.

It is manifest that a Circuit Court of Hawaii is neither "a Circuit or a District Court of the United States" nor is it a

court "of record of any of the states having common-law jurisdiction," as specified in section 2165 of the Revised Statutes.

Hence, if these Hawaiian Circuit Courts have naturalization jurisdiction, it can only be upon the hypothesis that they are "District" courts of the Territory. This is the crucial hypothesis. It is recognized by Chief Justice Frear of the Hawaiian Supreme Court, who, in his opinion in this case, said:

> "The statute (Rev. Sts. Sec. 2165) permits naturalization by 'a circuit or district court of the United States, or a district or supreme court of the territories, or a court of record of any of the states having common law jurisdiction, and a seal and clerk.' Thus the jurisdiction is conferred on federal, state and territorial courts. If the circuit courts of this Territory have it, it must be because they are 'district courts' of a territory within the meaning of the statute. The question then is whether the word 'district' in the statute is a word of description or a proper name. If it is the latter and refers only to such courts of that name as have been created by congress in other territories the statute does not apply to our circuit courts. If it is descriptive there is no reason why it should not apply."
>
> Record, 16.

The Chief Justice, in concluding his concurring opinion, says, "On the whole, *although with much doubt*, I am of the opinion that the circuit courts have such jurisdiction." (Record, 17.) This opinion of the Chief Justice was answered by Justice Hartwell in his dissenting opinion, who, in concluding, said:

> "For this court to declare that circuit courts have jurisdiction for the purpose of naturalizing aliens would be practically the same as enacting a law to that effect, doing this upon the theory that Congress intended that our circuit courts should have like powers with state courts of record in respect of this matter of naturalization; or else upon the theory that Congress really meant that our circuit courts should

take the place of the district courts in the other territories. There is no reason why this court should indulge in any presumptions concerning a statute which is so clearly expressed as to leave no occasion for its interpretation or construction.

"As I regard the statute as too clear to admit construction of its meaning and as its expressed language does not authorize naturalization by our circuit courts, I am unable to concur in the opposite conclusion of the court."

Appendix A of this brief page 38.

The Hawaiian Circuit Courts Are Not Territorial District Courts, in Name, in Personnel or in Jurisdiction.

1. Name.

Clearly, if the name is of any importance, the Circuit Courts of Hawaii have no naturalization jurisdiction under section 2165 of the Revised Statutes. That section confers jurisdiction only upon the territorial *district* and supreme courts.

Section 81 of the Organic Act of April 30, 1900 (31 Stats., 157), provides:

> "SEC. 81. That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided."

Among the inferior courts of Hawaii which had theretofore been created and which were continued by this section were certain courts called "District Courts," existing under chapter 79 of the civil laws of the Republic. District courts of similar character were established by the Revised Laws of the Territory of Hawaii, their civil jurisdiction being de-

termined by section 1662 thereof, and their criminal jurisdiction by section 1664 thereof. An examination of these sections confirms the statement of Chief Justice Frear in his concurring opinion where he says:

> "Our district courts corresponding most nearly to justices' courts elsewhere do not have jurisdiction to naturalize although they are 'district courts' of a territory, nor could our territorial legislature confer such jurisdiction upon even a court of record of general jurisdiction by merely calling it a district court." Record, 16.

Hence, during the pertinent period of 1900 to 1905, Hawaii possessed both circuit and district courts. Whether or not Chief Justice Frear is correct in his denial of naturalization jurisdiction to the Hawaiian district courts is of no present interest, since no such jurisdiction is here involved.

It is plain, however, that the Hawaiian *circuit* courts are not, *in name*, the Territorial *district* courts of section 2165 of the Revised Statutes.

2. Personnel.

Nor are the circuit courts of Hawaii constituted in a manner similar or analogous to the constitution of the Territorial district courts to which section 2165 of the Revised Statutes refers. Title XXIII of the Revised Statutes relates to the Territories, and chapter 1 thereof has provisions common to all the Territories. The pertinent sections are as follows:

> "SEC. 1864. The Supreme Court of every Territory shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum, and they shall hold their offices for four years, and until their successors are appointed and qualified. They shall hold a term annually at the seat of government of the Territory for which they are respectively appointed.
>
> "SEC. 1865. Every Territory shall be divided into three judicial districts; and a district court shall be

> held in each district of the Territory by one of the justices of the supreme court, at such time and place as may be prescribed by law; and each judge, after assignment, shall reside in the district to which he is assigned."

It is to this class of Territorial district courts that section 2165 of the Revised Statutes has reference.

In accordance with section 1865, each Territory is divided into three judicial districts, and court is held therein by one of the justices of the supreme court of the Territory.

Hence, the Territorial district courts contemplated by the Revised Statutes are held only by justices of the supreme court.

This is not true of the Hawaiian circuit courts. In the Hawaiian Republic there were five circuits and six circuit judges (two for the first circuit, and one for each of the other four), and these circuit judges were not justices of the supreme court. (Civil Laws of the Hawaiian Islands, sections 1135 and 1137, page 455.) This organization was continued by the Organic Act, and the only difference introduced by the Revised Laws of Hawaii, in force February 1, 1905, is that the first circuit may have (and now does have) three judges.

> Revised Laws of Hawaii, sections 1637, 1639 and 1640, pages 640, 641.

The Territorial district courts are those held by Supreme Court justices, while Hawaiian circuit courts are held by judges inferior to the Supreme Court justices.

The Revised Statutes, in dealing with the then distant Territories, granted the power to naturalize only to Territorial courts presided over by the Supreme Court justices, the highest judicial officers in the Territories.

Can it be fairly contended that Congress intended anything less in Hawaii? Hawaii is one of the distant insular possessions of the United States, far removed from the sentiment and environment of the American continent, and is a convenient refuge for the Oriental races. It is reasonable to

assume that, in such a community, greater safeguards should be thrown around naturalization than on the American continent. In the continental Territories only the highest judicial officers can naturalize. It is unreasonable to assume that Congress, by implication merely, intended to confer this important power on inferior judges in these distant islands.

3. Jurisdiction.

The Revised Statutes give to the district courts of the then existing Territories the jurisdiction under the Constitution and laws of the United States which is vested in both the circuit and district courts of the United States by the following section:

> "SEC. 1910. Each of the district courts in the Territories mentioned in the preceding section shall have and exercise the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the circuit and district courts of the United States; and the first six days of every term of the respective district courts, or so much thereof as is necessary, shall be appropriated to the trial of causes arising under such Constitution and laws; but writs of error and appeals in all such cases may be had to the supreme court of each Territory, as in other cases."

Under this section, these Territorial district courts have jurisdiction in Admiralty, Patent, and other like matters wherein the United States has exclusive jurisdiction. All the jurisdiction which other provisions of the Revised Statutes assign to the United States district and circuit courts is thus conferred upon the Territorial district courts.

The Hawaiian circuit courts have not such jurisdiction. The Organic Act of April 30, 1900, nowhere *adds* to the jurisdiction of the circuit courts, but actually *takes away* jurisdiction which these courts had had, as in Admiralty cases and in suits against foreign ambassadors and ministers.

31 Stats., 142, sec. 7 (*supra*, page 8, and foot note).

Nor was this an oversight on the part of Congress. On the contrary, Congress, by the Organic Act, created a special Federal court, to which was given the same jurisdiction which had been given by section 1910 of the Revised Statutes to the district courts of the then existing Territories. Certainly it cannot be contended that the Hawaiian circuit courts have jurisdiction in patent cases, for example, because the Territorial district courts have such jurisdiction.

By the Organic Act Congress was careful to leave all local jurisdiction to the existing Hawaiian courts, and it conferred the jurisdiction peculiar to the United States courts upon a new Federal court, created by it.

It would be just as reasonable, therefore, to assume that Congress intended the Hawaiian circuit courts to have concurrent jurisdiction with the Federal court with respect to Federal questions generally (including patents) as to assume naturalization jurisdiction.

Nor can it be contended that Congress overlooked the subject of naturalization in the Organic Act. On the contrary, section 100 (31 Stats., 161) is directed to naturalization, and does not confer any jurisdiction with respect thereto.

The historical situation is plain. Under the Hawaiian Republic the only court which had naturalization jurisdiction was the Supreme Court. None of the inferior courts, including the circuit courts in question, had that jurisdiction.

The Organic Act does not disturb the jurisdiction of the Supreme Court, and gives greater opportunity for naturalization than under the Republic, by creating a Federal court having that jurisdiction.

The Hawaiian circuit courts never had naturalization jurisdiction under the Republic, and after annexation could acquire it only by Congressional enactment. The Organic Act did not give that jurisdiction. That jurisdiction cannot be spelled out of section 2165 of the Revised Statutes (cov-

ering naturalization jurisdiction) because if that section is pertinent at all, it must be on the theory that the Hawaiian circuit courts are Territorial district courts, and such two classes of courts are unlike in name, in personnel, and in jurisdiction.

SUBSEQUENT CONGRESSIONAL LEGISLATION.

Since the judgment of the Hawaiian Supreme Court on the questions here involved, a new Naturalization Act was approved June 29, 1906 (34 Stats., 596). Under section 3 of this new law, the Hawaiian circuit courts are given naturalization jurisdiction, since they fall within the category of "all courts of record in any State *or Territory* now existing, or which may hereafter be created, having a seal, a clerk, and jurisdiction and actions at law or equity, or law and equity, in which the amount in controversy is unlimited." This new section, which displaces section 2165 of the Revised Statutes, for the first time gives jurisdiction to these Hawaiian circuit courts. This new naturalization law hedges in the subject of naturalization so stringently that such courts as the Hawaiian circuit courts may safely be intrusted with this power.

Manifestly, no such legislation with regard to jurisdiction was necessary if the Revised Statutes were already sufficient to confer naturalization powers to the extent asserted by the majority opinions of the Hawaiian Supreme Court in the present case.

This new act of June 29, 1906 (so far as amplified naturalization jurisdiction is concerned), is due, in part, at least, to the previous Hawaiian situation.

This matter was referred to at length in the report of the Governor of the Territory of Hawaii to the Secretary of the Interior, dated October 5, 1905. Among the items of recommended legislation in the Governor's report is:

> "Third. An act clearly defining the jurisdiction of the circuit courts in Hawaii in reference to their power of naturalizing aliens and legalizing their previous actions in that respect by amending section 100 of the Organic Act."
>
> See foot note.

Appended to the report of the Governor is a communication concerning the judiciary department by Chief Justice Frear, of the Supreme Court (who rendered one of the majority opinions in the present case). Chief Justice Frear calls attention to the existing doubt as to the jurisdiction of the circuit courts of the Territory, and concludes:

> "It might be well to amend section 100 of the Organic Act of the Territory so as to ratify all naturalizations hitherto granted by the circuit courts and at the same time place their jurisdiction beyond question."

It is significant that the Chief Justice himself, in concluding his opinion in the present case, says: "On the whole, *although with much doubt*, I am of the opinion that the circuit courts have such jurisdiction."

Record, 17; italics ours.

OPINION OF CHIEF JUSTICE FREAR.

Chief Justice Frear agrees that the Hawaiian circuit courts are not Territorial district courts in *name*. He says:

> "The question then is whether the word 'district' in the Statute is a word of description or a proper name. If it is the latter and refers only to such courts of that

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NOTE.—This report is contained in the Annual Reports of the Department of the Interior for the fiscal year ended June 30, 1905, relating to Governors of Territories, etc. The portions of the report of the Governor of Hawaii which relate to naturalization are printed as Appendix B to this brief, page 39 *et seq.*

> name as have been created by Congress in other territories the Statute does *not* apply to our circuit courts. If it is descriptive there is no reason why it should not apply."
>
> Record, 16; italics ours.

But, as already shown, the *description* of the Territorial district courts does not apply to the Hawaiian circuit courts. If the word "district" in Sec. 2165 of the Revised Statutes is to be regarded as indicative of the personnel and jurisdiction of the Territorial district courts, then it is not indicative either of the personnel or jurisdiction of the Hawaiian circuit courts. These two classes of courts are different in character as well as in name.

Even where courts have the same name and similar jurisdiction the Supreme Court of the United States has held that such similarity does not make them identical. In Reynolds *v.* United States, 98 U. S., 145, 154, this Court said:

> "By section 1910 of the Revised Statutes the District Courts of the Territory have the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States; but this does not make them Circuit and District Courts of the United States. We have often so decided. *Ins. Co. v. Canter*, 1 Pet., 511; *Benner v. Porter*, 9 How., 235; *Clinton v. Englebrecht*, 13 Wall., 434. They are courts of the Territories, invested for some purposes with the powers of the courts of the United States. Writs of error and appeals lie from them to the Supreme Court of the Territory, and from that court as a territorial court to this in some cases."

In other words, it is necessary to examine all of the conditions surrounding given classes of courts in order to establish their substantial identity.

Chief Justice Frear further says:

> "The name 'circuit courts' was retained by Congress because that name was already in use here."
>
> Record, 16.

Congress did more than that in the Organic Act. It not only retained this name but it retained the courts themselves, with their organization and their jurisdiction, except insofar as it took away from their jurisdiction. In all respects wherein these circuit courts under the Hawaiian Republic had had any jurisdiction corresponding to the Federal jurisdiction of the United States, the Organic Act took it away and conferred it upon the Federal Court created by the Organic Act.

Chief Justice Frear further says:

> "That the word 'district' should be construed in the descriptive sense with reference to territories, is supported by the fact that congress itself so construed the same word with reference to the states when, after conferring jurisdiction to naturalize upon the 'supreme, superior, district or circuit court of some one of the states' by the act of 1795, it provided as follows in the act of 1802 (2 St. at L., p. 155): 'And whereas, doubts have arisen whether *circuit* [certain] courts of record in some of the states, are included within the description of district or circuit courts: Be it further enacted, that every court of record in any individual state, having common law jurisdiction, and a seal and clerk or prothonotary, shall be considered as a district court within the meaning of this act.'"
>
> Record, 17.

Section 3 of the Act of Congress of 1802, from which the Chief Justice quotes, in its entirety is as follows:

> "SEC. 3. *And whereas*, doubts have arisen whether *certain* courts of record in some of the states, are included within the description of district or circuit courts: *Be it further enacted*, that every court of record in any individual state, having common law jurisdiction, and a seal and clerk or prothonotary, shall be considered as a district court within the meaning of this act; *and every alien who may have been naturalized in any such court, shall enjoy, from and after the passing of the act, the same rights and priv-*

ileges, as if he had been naturalized in a district or circuit court of the United States."
2 Stats., 155.

There is no analogy between this early congressional legislation and that relating to the Hawaiian Islands. There is nothing in the Act of 1802 to indicate what the *"certain* courts of record in some of the states" may have been concerning which doubts had arisen. In any event, Congress had plenary constitutional power over the subject and the Act of 1802 declared that all State courts of record having common law jurisdiction and a seal and clerk or prothonotary shall be considered a "district" court; and the remedial act went further and confirmed the acts of such courts, such confirmation, however, taking place *only* "from and after the passing of the Act."

Undoubtedly Congress has the power to do as it pleases. It has by the Act of June 29, 1906, given naturalization jurisdiction to the Hawaiian circuit courts through proper phraseology, and might have done so by using the identical phraseology of the Act of 1802. Moreover, Congress in the Act of June 29, 1906, might have confirmed, as in the Act of 1802, the naturalization acts of these Hawaiian circuit courts, making such confirmation take effect on the passage of the Act. Congress can exercise its authority with respect to naturalization in different ways. It has by direct enactment not only naturalized entire classes of people, but also particular individuals. (See foot note.) Further, the act of 1802 was not a judicial determination of the meaning of the prior Act of 1795, but was a remedial act rendering such judicial interpretation unnecessary.

NOTE.—The Organic Act of April 30, 1900, by section 4, declared all citizens of the Republic of Hawaii to be citizens of the United States (31 Stats., 141).

By Joint Resolution, approved May 18, 1898 (30 Stats., 1496), Nellie Grant Sartoris was specially naturalized.

Chief Justice Frear further says that "not only is there no objection to the exercise of such jurisdiction by the circuit courts," but goes on to point out inconveniences which result from such lack of jurisdiction. Manifestly, whether or not there is any objection is for Congress to determine. The inconvenience of having only a few courts with naturalization jurisdiction was no more after the Organic Act than under the Republic. In fact, the Organic Act gave additional opportunity for naturalization in the creation of the Federal Court. It may well have been that the Congress realized the distance of the Hawaiian Islands and the peculiarity of their position with reference to the Orient and saw serious objections to granting naturalization jurisdiction to these circuit courts, and only extended such jurisdiction to them later by the Act of June 29, 1906, because of the restrictions thrown around the subject by that Statute.

Similar considerations were discussed by Mr. Justice B. R. Curtis in *Ex parte* Cregg, at the Circuit in 1854, wherein he considered the jurisdiction of a Massachusetts State Court in connection with the provisions of Section 3 of the Act of 1802. In *ex parte* Cregg the petitioner had made previous declaration of his intention to become naturalized in the Police Court in the city of Lynn. That court was a "court of record in any individual state, having common law jurisdiction, and a seal" in compliance with the statute of 1802, but it did not have a clerk, the Justice himself being the recording officer. Mr. Justice Curtis (with whom the District Judge agreed) held that the Police Court had no jurisdiction under the Act of 1802, saying:

> "The importance and value of this privilege of citizenship, which is conclusively and finally bestowed by the act of the court having jurisdiction, should prevent us from allowing less than its full weight, to any requirement by congress which tends to restrict this power, to those tribunals which may be supposed most competent to exercise it. And certainly, there would seem to be no propriety in intrusting to a court,

> which, in the exercise of its common law jurisdiction, cannot pass finally on any matter of law or fact, affecting property to the amount of one dollar, to make a final decision upon all questions of law or fact involved in an application for this great right, so as to make an absolute and unimpeachable grant of it. Now it is generally true, that a court of record, which is without a clerk or prothonotary, is not only a subordinate tribunal, but one to which a very narrow and comparatively unimportant jurisdiction is intrusted. It is also true that there is more security, that its proceedings will be correctly recorded and certified, if it has such an officer charged with those particular duties. Congress might well have had both these things in view, when it required the court to have such an officer. And we are of opinion, that a court not having such an officer, does not possess the authority conferred by the act."
>
> *Ex parte* Cregg, 6 Federal Cases, page 797.

If it is desirable for purposes of convenience, that a larger number of courts should have naturalization jurisdiction, the remedy is by Act of Congress, such as has now been afforded with respect to the Hawaiian Islands by the Act of June 29, 1906. No court can assume this jurisdiction of its own accord.

Chief Justice Frear says:

> "Such jurisdiction has been exercised by the circuit courts ever since the establishment of territorial government and probably the majority, about a thousand, of naturalizations, have taken place in those courts. I believe the exercise of such jurisdiction by the circuit courts was begun on the suggestion of United States District Judge Estee, and more recently an application to his successor, Judge Dole, for naturalization by one whose naturalization by a circuit court had been questioned, was denied."
>
> Record, 17.

There is no evidence in the record as to the number of naturalizations by the Hawaiian circuit courts, but assum-

ing that this estimate is correct, the remedy is through Congress, which can confirm such naturalizations as it did in 1802. But the foregoing quotation from Chief Justice Frear's opinion shows that the jurisdiction was doubted during the here pertinent period, and this is further shown by the report of the Governor of Hawaii dated October 5, 1905, who said:

> "Matters proceeded in this manner unquestioned until, upon the appointment of several of the new circuit court judges within the last two years, questions were raised by them, not only as to their power to naturalize aliens, but as to whether aliens who had been naturalized by the circuit courts were citizens of the United States, capable of serving on juries or exercising the voting franchise." * * *
>
> Appendix B to this brief, page 40.

Manifestly, the inconvenience which may now result from the correct adjudication of the law is one which could have been avoided, since the Hawaiian circuit courts chose to assume voluntarily an admittedly doubtful jurisdiction.

OPINION OF JUSTICE WILDER.

Justice Wilder reaches his concurring conclusion on a different line of argument from that adopted by the Chief Justice. The Chief Justice tries to make these Hawaiian circuit courts the equivalent of *territorial district courts*. Justice Wilder tries to show that these Hawaiian circuit courts are equivalent to the *courts of the States* as defined in Sec. 2165 of the Revised Statutes, presenting this as an alternative view to that of the Chief Justice. In this connection Justice Wilder says:

> "Congress not having established within this Territory the ordinary territorial courts, and having provided a system similar to that in the several States, it follows that the jurisdiction to naturalize in this Territory should be and is the same as in a State namely,

> by a court of record having common law jurisdiction and a seal and clerk. Each of our circuit courts is a court of record having common law jurisdiction and a seal and clerk. That this was the intention of Congress we have no doubt, when it is considered that Congress established in this Territory a district court of the United States, the same as is established in every State of the Union, and which has, of course, power to naturalize."
>
> Record, 14-15.

Obviously, this contention is unsound. The Hawaiian circuit courts are not State courts. Moreover, the courts of the several States acquire naturalization jurisdiction simply because Congress so enacts. The Hawaiian circuit courts can get their jurisdiction only in the same way. There is no such thing as any inherent power of the courts in this respect.

The courts have no such common law jurisdiction. Prior to July 4, 1776, the English courts had no such jurisdiction, naturalization being by Act of Parliament. (Blackstone's Commentaries, Book 1, page 374.) In the American colonies different practices prevailed. Connecticut, New Hampshire, Pennsylvania, North Carolina and Georgia had no general naturalization laws. In some of the colonies, such as Massachusetts and New York, aliens were naturalized by the legislature after preliminary oaths before designated judges. In Delaware a foreigner could be naturalized by taking an oath before the President of the State or before any of the Supreme Court Judges, and before other officials, such as members of the General Assembly. In the Republic of Hawaii naturalization jurisdiction was exclusive with the Supreme Court justices.

The status of naturalization in the American colonies is set forth in the Report to the President of the Commission on Naturalization, House Document No. 46, 59th Congress, 1st session.

Congress might have conferred the power to naturalize

upon the governors of the several States, or upon any other designated officials. It has chosen, however, to confer this jurisdiction upon certain specified courts, and the Hawaiian circuit courts were not among these during the period in question. Justice Wilder says (Record, 15):

> "The privilege of becoming an American citizen is a great one, but the number of courts with jurisdiction to naturalize should not be limited unless Congress expressly or by necessary intendment so provides. The tendency of congressional legislation on the subject has been to enlarge rather than to diminish the number of courts which could naturalize. See *Ex parte* Cregg, 2 Curt., 98. The very reason for investing Congress with power to establish a uniform rule of naturalization was to guard against a too narrow instead of a too liberal mode of conferring citizenship. Collet *v.* Collet, 2 Dall., 294." * * *

Manifestly, this line of argument is one which should be directed to the discretion of Congress if more courts ought to have jurisdiction. The fact that Congress may from time to time have increased the distribution of this jurisdiction is no reason why an unspecified court should assume it. Instead of Congressional legislation acting as a *limitation* upon the jurisdiction of the courts (as the learned Justice seems to assume) the jurisdiction does not exist until Congress grants it.

The citation by Justice Wilder of the case of Collet *v.* Collet, 2 Dall., 294, in this connection is peculiarly unfortunate, because that opinion of the Circuit Court of Pennsylvania stands alone and has not been followed. In that case the Circuit Court held that the States had concurrent jurisdiction over the subject of naturalization, saying:

> "We are of opinion, then, that the States, individually, still enjoy a concurrent authority upon this subject; but that their individual authority cannot be exercised, so as to contravene the rule established by the authority of the Union."

> "The true reason for investing *Congress* with the power of naturalization has been assigned at the Bar: It was to guard against too narrow, instead of too liberal, a mode of conferring the rights of citizenship. Thus, the individual States cannot exclude those citizens who have been adopted by the *United States;* but they can adopt citizens upon easier terms than those which *Congress* may deem it expedient to impose."

But Chief Justice Marshall, in delivering the opinion of the Supreme Court in the case of Chirac *v.* Chirac, 2 Wheaton, 269, said:

> "That the power of naturalization is exclusively in Congress does not seem to be, and certainly ought not to be, controverted;" * * *

But even assuming that the States may possibly have concurrent jurisdiction with the United States on the subject of naturalization, Hawaii is not a State and even the legislature of the Hawaiian Republic never conferred the power of naturalization upon the circuit courts.

Justice Wilder, in endeavoring to support the proposition that the circuit courts of Hawaii have practically the same jurisdiction as the ordinary territorial district courts, and hence the power to naturalize, refers to *Ex parte* Lothrop, 118 U. S., 113. This Lothrop case is irrelevant. In that case Lothrop had been convicted of the crime of grand larceny by the county court of Cochise county, in Arizona, and Mr. Chief Justice Waite, in delivering the opinion of the Court, said:

> "the only question presented by his petition is whether the Territorial Legislature of Arizona had authority to create and establish that court. There is no question of the jurisdiction of the court to try the petitioner for the offense of which he was convicted, if the court itself was rightfully created."

The opinion then quotes the relevant provisions of the Revised Statutes, including Secs. 1864 and 1865 (see page 13, *supra*), and also the two following sections:

> "SEC. 1851. The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States."
>
> "SEC. 1908. The judicial power of Arizona shall be vested in a Supreme Court and such inferior courts as the legislative council may by law prescribe."

This last section is peculiar to Arizona of all the then territories. The Territorial legislature, by an act approved March 12, 1885, created a county court in the county of Cochise and gave it substantially concurrent jurisdiction with the territorial district courts, the opinion quoting the jurisdictional part of the act in full.

Among the provisions of this section is the following:

> "And said court shall have the power of naturalization, and to issue papers therefor."

The Supreme Court of the United States did not refer to this power in any manner. On the contrary, the sole question determined by this Court was whether the creation of the county court was within the power of the Arizona legislature. This Court said:

> "The precise question for determination is whether such a court with such a jurisdiction is an 'inferior court' within the meaning of Sec. 1908."

This question was decided in the affirmative.

Whether or not giving that county court the power to naturalize was within the competency of the Arizona legislature was not considered and was not decided.

Assuming, however, that it was within the power of the Arizona legislature to confer naturalization jurisdiction upon a court created by itself, and that the Lathrop decision is in

accordance with this assumption, the logical effect is *against* and not in favor of the opinion of Justice Wilder. Manifestly, if this county court had that jurisdiction, such jurisdiction was acquired by the direct terms of the Statute, and not by any general resemblance between the county court and the Territorial district courts. The jurisdiction of the county court was statutory and not inferential. Justice Wilder treats the matter as though the jurisdiction were inferential, since otherwise it affords no support to his opinion. To make the facts of the Lothrop case analogous to the one at bar, it would have to be shown that the Hawaiian legislature had by statute conferred naturalization jurisdiction upon the Hawaiian circuit courts; and, if such were the case, the question would arise whether or not the Hawaiian legislature had any such authority under the Organic Act, and the Lothrop case, in that event, might have been used argumentatively in support of that proposition. But no such state of facts exists. The Hawaiian legislature has not attempted to confer naturalization jurisdiction upon the circuit courts.

The Lothrop case, if pertinent at all, simply shows that no court in the United States, or under its jurisdiction and control, can acquire naturalization jurisdiction except by a statute of a legislative body having constitutional authority.

CONCLUSION AS TO JURISDICTION.

No court within the territory subject to the United States can acquire naturalization jurisdiction except by a valid statute of a competent legislative body. This jurisdiction has never been conferred by any statute upon the Hawaiian circuit courts. The Hawaiian circuit courts do not fall within either the name or the description of any of the courts upon which naturalization power is conferred by Sec. 2165 of the Revised Statutes. These courts are not courts of a State, since Hawaii is a Territory and not a State; and

these courts are not Territorial district courts either in name, or as a matter of description, since they do not correspond therewith in organization, in personnel, or in jurisdiction.

EFFECT OF THIS CONCLUSION.

The Hawaiian circuit courts, having no jurisdiction to naturalize aliens, their acts were void, and Keizo was attempted to be indicted by only eight grand jurymen, whereas the Organic Act (Sec. 83) requires a grand jury of thirteen. The acts of these courts which had no naturalization jurisdiction are subject to collateral attack. In Thompson *vs.* Tolmie, 2 Peters, 163, this Court said:

> "If there is a total want of jurisdiction, the proceedings are void and a mere nullity, and confer no right, and afford no justification, and may be rejected when collaterally drawn in question."

The grand jury which indicted Keizo was improperly constituted and the subsequent trial was without due process of law. This in violation of Article 5 of the Amendments to the Constitution, which says:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War, or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

In the present case eight of the sixteen grand jurymen did not possess the statutory qualifications in that they were

not citizens of the United States. The lack of the statutory qualifications for jurymen vitiates the indictment. In Crowley *vs.* United States, 194 U. S., 474-6, this Court said:

> "In this connection the government calls attention to §1025 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 720), providing that 'No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter or form only, which shall not tend to the prejudice of the defendant.' This section can have no bearing on the present case, for the disqualification of a grand juror is prescribed by statute, and cannot be regarded as a mere defect or imperfection in form; it is matter of substance, which cannot be disregarded without prejudice to an accused."
>
> "For the reasons stated, and without considering other questions arising upon the plea in abatement as well as upon the record, we adjudge only that the presence on the grand jury of persons summoned after the local statute took effect, and who were disqualified by that statute,—those facts having been seasonably brought to the attention of the court, by a plea in abatement filed before arraignment,—vitiated the indictment."

Within three days after the illegal indictment Keizo filed his plea in abatement, Aug. 24, 1905. The stipulation (Record, 10) says:

> "1. That the said Defendant was not committed to the grand jury for the August Term, 1905, and neither said defendant nor his counsel knew or had reason to know that the said grand jury would hear or consider evidence in the above-entitled case until after the said grand jury was sworn to act as such grand jury at this term."

That this was the proper course to pursue is settled by Crowley *v.* United States, just quoted. In that case this Court further said (194 U. S., 474):

> "We are of opinion that the objection here, that grand jurors were disqualified by the statute of Porto Rico, was made in the proper way and in due time. The accused was not in court when the grand jurors were selected and the grand jury impaneled. So far as appears from the record, he was not aware that his case would be taken up by the grand jury. It does not appear he had, prior to the assembling of the grand jury, been arrested for the offenses for which he was indicted. But upon the return of the indictment he was brought to the bar of the court, and gave bond for his appearance and trial. His objection to the qualifications of the grand jurors was made promptly,—three days after the indictment was returned,—before he was arraigned, and as soon as he learned of the facts upon which the objection was based. All this was admitted by the demurrer to the plea in abatement. If the objection in this case was not sufficient, then an objection made by plea in abatement prior to arraignment, that a majority or even all of the grand jurors returning an indictment against the accused were disqualified by law, would have been equally unavailing. Such a result is not to be thought of."

Further, that the incompetency of a grand jury is properly brought into question by a plea in abatement is established by the opinion of this Court in United States *v.* Gale, 109 U. S., 65, 67, wherein it was said:

> "The defendants should either have moved to quash the indictment or have pleaded in abatement, if they had no opportunity, or did not see fit, to challenge the array. This, we think, is the true doctrine in cases where the objection does not go to the subversion of all the proceedings taken in impaneling and swearing the grand jury; but relates only to the qualification or disqualification of certain persons sworn upon the jury or excluded therefrom; or to mere ir-

> regularities in constituting the panel. We have no inexorable statute making the whole proceedings void for any such irregularities."

After conviction and the refusal of the Supreme Court of Hawaii to order a new trial, Keizo obtained a writ of *habeas corpus* returnable to the Supreme Court of Hawaii in accordance with Section 1628 (page 636) of the Revised Laws of Hawaii, in force February 1, 1905, which provides that:

> "each of the justices shall have original jurisdiction and power to issue writs of *habeas corpus* and may make such writs returnable before himself or the Supreme Court or before any Circuit Court or any judge thereof."

On the discharge of the writ of *habeas corpus* by the Supreme Court of Hawaii, the case was brought to this Court by writ of error, in accordance with the provisions of Section 86 of the Organic Act of April 30, 1900, which provides:

> "The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."
> 31 Stats. 158.

This section of the Organic Act was upheld by this Court in the case of *Equitable Life Assurance Society of the United States v. Brown*, 187 U. S. 309.

Hence, the jurisdiction of this Court is determined by Section 709 of the Revised Statutes, as amended February 18, 1875, providing that:

> "A final judgment or decree in any suit in the highest court of a state * * * where any title, right, privilege, or immunity is claimed under the Constitution * * * and the decision is against the title, right, privilege, or immunity specially set up

> or claimed, by either party, under such Constitution * * * may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

In the present case the right, privilege and immunity claimed under Article V of the amendments to the Constitution of the United States are severally set up and claimed by the plaintiff in error and the decision of the highest court of the Territory of Hawaii was against such right, privilege and immunity.

The case comes to this Court under circumstances closely analogous to those present in the case of Yick Wo *v.* Peter Hopkins, Sheriff of the City and County of San Francisco, 118 U. S. 356. In that case Yick Wo had been sentenced to imprisonment by a police court of San Francisco for violation of a local ordinance. He petitioned the Supreme Court of California for a writ of *habeas corpus*, which was denied. The matter was then brought to the Supreme Court of the United States by writ of error. This Court decided that the local ordinance was in violation of Article XIV of the amendments to the Constitution of the United States, in that it discriminated against Chinamen, and denied them the equal protection of the laws. The opinion says (374):

> "The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is therefore illegal, and they must be discharged.
>
> "To this end, the judgment of the Supreme Court of California in the case of Yick Wo, and that of the Circuit Court of the United States for the District of California in the case of Wo Lee, are severally *reversed, and the cases remanded, each to the proper*

court, with directions to discharge the petitioners from custody and imprisonment."

It is respectfully submitted that in the present case the judgment of the Supreme Court of Hawaii should be reversed, and the case remanded, with direction to discharge the plaintiff in error from custody and imprisonment.

DUANE E. FOX,
ARTHUR S. BROWNE,
Attorneys for Plaintiff in Error.

A. S. HUMPHREYS,
Of Counsel.

WASHINGTON, D. C., *September* 18, 1908.

APPENDIX A.

KEIZO
vs.
HENRY.

Submitted December 23, 1905; Decided January 3, 1906.

Dissenting Opinion of HARTWELL, *J.*:

Congress alone can authorize a court to naturalize aliens. The only authority by which aliens can be naturalized in Hawaii is that which is granted to the federal court and to "a district or supreme court of a territory" by Sec. 2165, U. S. Rev. Stat. Unlike our circuit courts territorial district courts in other territories than Hawaii are held by one of the justices of the territorial supreme court and, by act of Congress, have jurisdiction "of all matters and causes except those in which the United States is a party," including therein admiralty and bankruptcy matters.

It would be convenient to residents upon other islands than Oahu who desire to become naturalized to be able to go before the circuit courts upon those islands for that purpose although the federal court has authority to hold terms in any circuit whenever applications are pending there in sufficient number to justify the holding of a term. Probably Congress will amend the Organic Act to give our circuit courts the power to naturalize, which at present they do not have unless we regard them as included in the term "district courts of a territory." This cannot be done without changing the clearly expressed language of an act of Congress, doing this upon the theory that the act means something different from what it says. Every departure from the clear language of a statute is in effect an assumption of legislative powers by the court. Brewer *v.* Blougher, 14 Pet., 178. Whenever harm or absurdity results from taking a statute to mean just what it says all reasonable effort should be made to evade the literal meaning on the ground that Congress is not presumed to have intended such results, but here no such results will occur from restricting naturalization to this court and the federal court; the only loss would be in costs which

have been paid by those who have become naturalized in circuit courts and in cases of re-naturalization such costs ought to be remitted. Undoubtedly it was an oversight that the Organic Act did not at first give this power to our circuit courts, but we have no authority to supply the omission. "A case which has been omitted is not to be supplied merely because there seems to be no good reason why it should have been omitted, and the omission appears consequently to have been unintentional." Endlich, Int. St., Sec. 18. For this court to declare that circuit courts have jurisdiction for the purpose of naturalizing aliens would be practically the same as enacting a law to that effect, doing this upon the theory that Congress intended that our circuit courts should have like powers with state courts of record in respect of this matter of naturalization; or else upon the theory that Congress really meant that our circuit courts should take the place of the district courts in the other territories. There is no reason why this court should indulge in any presumptions concerning a statute which is so clearly expressed as to leave no occasion for its interpretation or construction.

As I regard the statute as too clear to admit construction of its meaning and as its expressed language does not authorize naturalization by our circuit courts, I am unable to concur in the opposite conclusion of the court.

Hawaiian Reports, Vol. 17, pages 302-303.

APPENDIX B.

Extracts from Report of the Governor of Hawaii to the Secretary of the Interior, October 5, 1905.

NATURALIZATION.

By a reference to the article on the judiciary department by Chief Justice Frear it will be noted that some question has been raised as to the jurisdiction of our Territorial circuit courts in naturalization matters. The "organic act" of Hawaii, by striking out all laws relating to Hawaiian naturalization, repealed all power in the various courts of Hawaii to naturalize aliens, power to naturalize being only such as is given by express statute and not inherent in any court, and thus left the question of naturalization to the United States Revised Statutes, section 2165 of which provided that an alien may be admitted to become a citizen of the United States by qualifying as therein provided before a circuit or district court of the United States or a district or supreme court of the Territories, or a court of record having a clerk and seal in any State.

Congress, in creating the Territory of Hawaii, recognized her isolated geographical position and provided a system of courts more nearly akin to that of the various States. A single district court of the United States was provided with the jurisdiction of both a district and circuit court of the United States, and with the right of appeal to the United States circuit court of appeals. No provision was made for the lower ordinary district courts of the United States as exists in the various Territories. On the other hand, "circuit courts" were provided for each of the main islands, clothed with the same power and jurisdiction as the ordinary trial courts of the various States and corresponding in jurisdiction with the "district" courts in the Territories as they existed at the time of the adoption of section 2165, before referred to.

Appeal from our Territorial circuit court lies to the supreme court of the Territory, as did appeal from Territorial district courts to Territorial supreme courts. But owing to these changes and the different designations the question has arisen as to whether the circuit courts of the Territory are district courts within the meaning of the Federal statute. It

was originally held by our various circuit judges that the circuit courts of Hawaii, having practically the jurisdiction of district courts in other Territories, the intent of the statute clearly designated them to take the place of district courts and naturalize aliens. This proved a great convenience to the people of the Territory, as both the supreme court of the Territory and the United States district court are located in Honolulu, a long distance for persons residing on the other islands to travel, and some 1,000 or more aliens, English, German, Portuguese, and other nationalities, have from time to time become naturalized by the circuit courts.

Matters proceeded in this manner unquestioned until, upon the appointment of several of the new circuit court judges within the last two years, questions were raised by them, not only as to their power to naturalize aliens, but as to whether aliens who had been naturalized by the circuit courts were citizens of the United States, capable of serving on juries or exercising the voting franchise. In some of the circuit courts of the Territory rulings like these have almost prevented jury trials, as it so reduced the number of residents capable of serving as jurors. It has caused the dismissal of a number of indictments, it being held that such indictments were improperly brought, owing to the presence on the grand jury of members who had been thus naturalized. Questions concerning voting and elections are also involved.

The issue is shortly to be brought before the supreme court of the Territory, and if it should be held that the circuit courts are not entitled to naturalize aliens a large number of people who have already been naturalized by them, and who are not only scattered throughout the islands, but many of whom have gone to the mainland, would be without naturalization, all of whom applied for and were naturalized in good faith, and thus an exceedingly chaotic, unfortunate condition would follow. Congress has the power to remedy this by an amendment to our "organic act," allowing aliens to be naturalized by any court of record having common law jurisdiction, a clerk, and a seal, upon such aliens complying with the conditions and provisions of the United States statutes. And it would be well to insert a further clause, that any person who had been naturalized by our circuit courts in such manner since the adoption of the "organic act" should not for that reason be disqualified as a citizen of the United States.

Pages 221 and 222.

Needed Legislation.

The summary of legislation suggested and recommended is as follows: * * *

Third. An act clearly defining the jurisdiction of the circuit courts in Hawaii in reference to their power of naturalizing aliens and legalizing their previous actions in that respect, by amending section 100 of the organic act.

Pages 234 and 235.

Judiciary Department.

[By W. F. Frear.]

Circuit Courts.

The circuit courts in general are pretty well up-to-date in their work. The circuit court of the first circuit, which a few years ago was very far behind in this respect, has made great progress in catching up with its calendar.

Some question has been raised as to the jurisdiction of the circuit courts in naturalization matters. This arises from the language of section 2165 of the Revised Statutes, which confers such jurisdiction upon the "district" courts of the Territories. The question is whether the circuit courts of the Territory of Hawaii are "district" courts within the meaning of that statute. Since the organization of the Territory these circuit courts have naturalized nearly 1,000 persons. This, of course, is exclusive of those naturalized by the supreme court and the Federal court in the Territory, the jurisdiction of which is unquestioned. It is very desirable that the circuit courts should have such jurisdiction for the convenience of persons desiring to be naturalized who live on islands or in circuits in which the supreme court and the Federal court do not sit. It might be well to amend section 100 of the organic act of the Territory so as to ratify all naturalizations hitherto granted by the circuit courts and at the same time place their jurisdiction beyond question.

Pages 272 and 273.

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Office Supreme Court, U. S.
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OCT 16 1908
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 27.

MORITA KEIZO, PLAINTIFF IN ERROR,

vs.

WILLIAM HENRY, HIGH SHERIFF OF THE TERRITORY OF HAWAII, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR DEFENDANT IN ERROR.

C. R. HEMENWAY,
Attorney-General of Hawaii,
for Defendant in Error.

M. F. PROSSER,
Of Counsel.

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IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR DEFENDANT IN ERROR.

Statement of Case.

This writ of error was sued out to review certain alleged errors in a judgment of the Supreme Court of Hawaii, rendered January 17, 1906, discharging a writ of *habeas corpus* and remanding petitioner, plaintiff in error here, to the custody of the High Sheriff of the Territory (Tr., p. 35).

The record shows that plaintiff in error was indicted for the crime of murder in the first degree by the grand jury for the August, 1905, term of the Circuit Court of the Fourth Judicial Circuit of the Territory of Hawaii, held at Honokaa,

on the Island of Hawaii, without having been first committed to said grand jury (Tr., p. 10); that of the grand jurors—sixteen in number—composing the grand jury which found said indictment, eight were persons who had been naturalized prior to the impanelling of said grand jury, by judgments of the circuit courts of Hawaii (Tr., p. 10); that after the finding of said indictment and before plea, plaintiff in error pleaded in abatement to the indictment that eight persons included in said grand jury, naturalized by the circuit courts of Hawaii, as aforesaid, were not citizens of the United States, and therefore the grand jury finding said indictment was illegally constituted and the indictment returned against plaintiff in error was void (Tr., p. 8).

The Territory filed a joinder to the plea, and the issue of law thus made was thereafter presented to the Supreme Court of Hawaii upon the following questions reserved to it by the circuit court:

"1st. Had the Circuit Court of the Fourth Circuit, Territory of Hawaii, between June 14th, 1900, and August 1st, 1905, jurisdiction to pronounce judgments of naturalization upon the eight aliens whose names are set forth in defendant's amended plea in abatement?

"2nd. Was the grand jury of this circuit, impanelled and sworn for the August, 1905, term of this court, comprising sixteen members, eight of whom were naturalized as aforesaid, a legal body under the laws of this Territory and competent to find a legal indictment against the defendant?

"3rd. Shall the defendant be held to answer the indictment thus found by said grand jury?" (Tr., pp. 11 and 12.)

On January 3, 1906, the Supreme Court of Hawaii, Justice Hartwell dissenting, rendered its decision upon these reserved questions, answering each in the affirmative (Tr., pp. 13 to 17).

Accordingly the plea in abatement was overruled; to which ruling exception was duly taken and allowed (Tr., pp. 17 to 19).

Plaintiff in error was thereafter tried upon said indictment before the Circuit Court of the Fourth Judicial Circuit, at the February, 1906, term thereof; found guilty as charged, and sentenced on the 22d day of March, 1906 (Tr., p. 4), by said court to suffer the penalty of death.

This judgment was thereafter brought before the Supreme Court of Hawaii on writ of error, and said court, on the 23d day of October, 1906, affirmed the same (Tr., p. 30).

On January 16, 1907, a writ of *habeas corpus* was issued by the Chief Justice of the Supreme Court of Hawaii (Tr., p. 22), upon the petition of plaintiff in error setting forth that he was illegally detained in custody because the judgment pronounced upon him by said circuit court was void, since the indictment upon which it was predicated was void, inasmuch as it was found by an improperly constituted grand jury (Tr., pp. 1 to 5).

As stated above, this writ was discharged, after due hearing, on January 17, 1907, and petitioner remanded to custody (Tr., p. 35).

On the same day, a petition for a writ of error to this court was presented and allowed (Tr., p. 36). The assignment of errors filed presents but one question of law, which may be stated as follows:

Had the circuit courts of the Territory of Hawaii jurisdiction to pronounce judgments of naturalization upon aliens between the 14th day of June, 1900, the date upon which the Organic Act of the Territory went into effect, and the 1st day of August, 1905, during which month plaintiff in error was indicted?

It is admitted that unless the circuit courts of Hawaii had power to naturalize aliens, the judgment against Morita Keizo must fall, because the indictment upon which such judgment is based was returned by a grand jury of sixteen, eight of whom claim citizenship only by reason of their naturalization by such circuit courts.

ARGUMENT.

AFTER THE PASSAGE OF THE ACT TO PROVIDE A GOVERNMENT FOR THE TERRITORY OF HAWAII (31 STATS. AT LARGE, 141), THE CIRCUIT COURTS OF HAWAII HAD POWER TO NATURALIZE ALIENS.

It is obvious that the power claimed to exist in the circuit courts of Hawaii must be found to have been conferred upon them by the statutes of the United States. Unless these courts are shown to be within the purview of the federal statutes regarding naturalization, then such power could not be exercised by them. There can be no doubt that Congress could give or withhold this power, as to it seemed wise, and the question here presented is therefore one of construction of the various statutes applicable.

*A. The circuit courts of Hawaii should be considered as included within the term "district * * * courts of the Territories," as used in section 2165, R. S.*

At the time the act creating the Territory of Hawaii took effect, the will of Congress as to what courts could exercise the power of naturalization was expressed in section 2165 of the Revised Statutes, which reads:

"SEC. 2165. An alien may be admitted to become a citizen of the United States in the following manner, and not otherwise:

"First. He shall declare on oath, before a circuit or district court of the United States, or a district or supreme court of the Territories, or a court of record of any of the States having common-law jurisdiction and a seal and clerk, two years, at least, prior to his admission, that it is *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and particularly by name, to the prince, potentate, state or sovereignty of which the alien may be at the time a citizen or subject."

By this section Congress described in general language all courts which might exercise this power, and, broadly, all of the State and Territorial courts of record were included. At the time of the adoption of the Revised Statutes the laws covering the various Territories provided for a supreme and district court in each, the former of which exercised appellate jurisdiction, while the latter were *nisi prius* courts, having general jurisdiction, both at law and in equity, and occupied in the Territories the same position that the various courts of record possessing common-law jurisdiction, by whatever name they were called, occupied in the various States. These laws were generalized in chapter I of title 23 of the Revised Statutes, and particular attention is called to sections 1864, 1865, 1869, 1907, 1909 and 1910 R. S.

It is therefore submitted that the intention of Congress was to grant power to naturalize aliens to those courts of the Territories which possessed the same or equal jurisdiction, speaking generally, as the courts of record of the various States exercised. The words "district or supreme court of the Territories" are as much words of description as are the words "a court of record of any of the States," and they should be so considered. There is no reason for restricting their meaning by a construction giving them the force of proper names only. As they stand in the section, they describe the territorial courts to which Congress granted this power, just as Congress likewise, by general words, described the courts of the States to which such power was given.

When the Republic of Hawaii was annexed to the United States, a government, fully organized and with a complete and long-established judicial system, already existed there. This system Congress did not materially change, making only such alterations as the establishment of a Federal district court in Hawaii and the extension of the Constitution and laws of the United States to Hawaii required. The judicial system thus continued in force may be more properly

compared to that existing in a State than to that existing in any other Territory.

Equitable Life Ins. Co. *v.* Brown, 187 U. S., 308.
Ex parte Wilders S. S. Co., 183 U. S., 545.

By section 81 of the Act to Provide a Government for the Territory of Hawaii (31 Stats. at L., 157), it is provided:

"That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish; and until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided."

By section 86 of the same act (31 Stats. at L., 158), there was established in Hawaii a district court of the United States, which, in addition to the ordinary jurisdiction of district courts of the United States, was given jurisdiction of all cases cognizable in a circuit court of the United States, and from this court writs of error and appeals may be had to the Circuit Court of Appeals of the Ninth Judicial Circuit.

This same section further provides:

"The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii" (31 Stats. at L., 158).

There was therefore established in Hawaii a judicial system differing entirely from that established or existing in any other Territory of the United States; and this fact must be borne in mind when considering the true construction of section 2165 of the Revised Statutes.

By section 5 of the act creating the Territory (31 Stats. at L., 141) it was provided:

"That the Constitution, and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States;" * * *

Since section 2165, Revised Statutes, regarding the naturalization of aliens, was not locally inapplicable, its provisions were extended to Hawaii. What courts, under it, are authorized to pronounce judgments of naturalization? Obviously the federal district court, as "a district court of the United States," has such power. It seems likewise clear that the Supreme Court of Hawaii, as a supreme court of a Territory, has the same power. This was conceded below and doubtless will be here, though if such court had been called the "Court of Appeals" or otherwise named, it might perhaps be claimed that it did not possess such power. If the circuit courts of Hawaii had happened to be designated as district courts, it would also appear that they are within the terms of the statute; and, since they occupy in Hawaii the same position in the judicial system as the district courts of other Territories occupy within their respective jurisdictions, it is now submitted that they are also within the purview of this section. The name in itself means nothing, and it will be shown that in jurisdiction the circuit courts of Hawaii are equal or similar to the district courts of the other Territories, and to the courts of record having common-law jurisdiction of the various States.

B. The circuit courts of Hawaii are in all respects similar to and possess equal jurisdiction to the courts of the States described in section 2165, Revised Statutes, and to the district courts of other Territories.

The circuit courts of Hawaii are courts of common-law jurisdiction, having clerks and seals.

By the Laws of 1892, chapter 57, section 36, as amended

by the Laws of 1903, chapter 32, section 10 (now section 1647 of the Revised Laws), it is provided:

"SEC. 1647. The several circuit courts shall have jurisdiction subject to appeal and exceptions to the Supreme Court according to law, as follows:

"First. Of all criminal offenses cognizable under the laws of the Territory committed within their respective circuits or transferred to them for trial by change of venue from some other circuit court.

"Second. Of all suits for penalties or forfeitures incurred under the laws of the Territory.

"Third. Of all causes, civil or criminal, that may properly come before them on appeal from any other court according to law.

"Fourth. Of all civil causes at law except as otherwise expressly provided."

By the Laws of 1892, chapter 57, section 65 (now section 1683, Revised Laws), it is provided that each court of record shall have a seal.

"SEC. 1683. Each court of record shall have a seal, which shall be in the custody of the clerk of such court and shall be impressed upon all processes and official certificates accompanied by the clerk's official attestation."

By the Civil Code of 1859 (compiled Laws, section 875; Civil Laws, section 1142), now section 1643, Revised Laws, it is provided:

"SEC. 1643. The seals of the several circuit courts shall be those already devised and in use by said courts."

The powers of the circuit courts are further defined by the Laws of 1892, chapter 57, section 42 (now section 1651, Revised Laws):

"SEC. 1651. The several circuit courts shall have power to compel the attendance of parties and witnesses from any part of the Territory, to compel the production of books, papers and accounts, to make and award all such judgments, decrees, orders and mandates, to issue all such executions or other processes, and do all other such acts and take all other

steps necessary to carry into full effect all the powers which are or may be given to them by the laws of the Territory or which may be necessary for the promotion of justice in matters pending before them."

Clerks are provided for the various circuit courts by the Laws of 1892, chapter 57, section 59 (now section 1680, Revised Laws):

"SEC. 1680. There shall be a clerk of the judiciary department and as many deputy clerks as the business of the department shall require, whose salary shall be fixed by the legislature.

"The clerk of the judiciary department shall be appointed by the justices of the Supreme Court, and shall be *ex officio* clerk of all the courts of record of the Territory, and as such may issue process returnable in all such courts. He shall have supervision and direction of the deputy clerks, but shall not be held responsible for their acts or omissions. He shall have charge of the records, moneys, and business in the central office in Honolulu and shall supervise and direct the mode of keeping accounts and records.

"There shall be two or more deputy clerks for the first circuit who shall be clerks of the Supreme Court and of the Circuit Court of the First Circuit.

"Of these two may be appointed and removed by the Chief Justice of the Supreme Court, and one by each of the circuit judges of the first circuit. There shall also be one deputy clerk for each of the other circuit courts appointed and removable by the judge thereof. Any deputy clerk may be removed by the Supreme Court for inefficiency or misconduct."

The duties of the clerks of the several circuit courts are set forth in the Laws of 1892, chapter 57, section 62 (now section 1688, Revised Laws):

"SEC. 1688. The clerks of the courts of record of the Territory shall have power to issue process, administer oaths, take depositions, tax costs and perform all other duties pertaining to their office; they shall also be *ex officio* masters in chancery.

"A clerk shall attend and record the proceedings and all sittings of courts of record, and in proceedings before a cir-

cuit judge, if there is no official reporter in attendance, record the oral evidence adduced when so required by the judge."

It is therefore submitted that, so far as jurisdiction is concerned, the circuit courts of Hawaii are as well qualified as are the district courts of any other Territory, or the courts of record having common-law jurisdiction of any State, to exercise the power of naturalization. They should therefore be regarded as possessing this power, without regard to the difference in name, and the further difference that circuit judges preside over them instead of the various Supreme Court Justices, as in other Territories.

Simply because Congress established a form of government in Hawaii different in many ways from that given to most of the other Territories, it should not be concluded that it was the intention to exclude the circuit courts of Hawaii from the number of courts possessing power to naturalize. On the contrary, since courts of like authority and power to the district courts of other Territories were established, it should be presumed that, in the absence of express words of exclusion, such courts would have such power.

Whatever is within the intention of the makers of a statute is as much within the statute as if it were within the letter.

> People *v.* Utica Ins. Co., 15 Johns., 358, 381.
>
> Smythe *v.* Fiske, 23 Wall., 374, 380.
>
> Hawaii *v.* Mankichi, 190 U. S., 197, 212.
>
> Church of the Holy Trinity *v.* United States, 143 U. S., 459.

The construction contended for is aided by a consideration of the history of the various statutes covering the subject of naturalization and the decisions of the courts construing such acts.

C. A study of the naturalization laws passed by Congress shows that the tendency has been towards enlarging and not curtailing opportunities therefor.

By the Act of March 26, 1790 (1 Stats. at L., 103), it was provided that—

"any alien being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof, on application to any common-law court of record, in any one of the States wherein he shall have resided for the term of one year at least, and making proof to the satisfaction of such court, that he is a person of good character, and taking the oath or affirmation prescribed by law, to support the Constitution of the United States, which oath or affirmation such court shall administer;" * * *

This act was repealed by the Act of January 29, 1795 (1 Stats. at L., 414), which, among other things, provided that naturalization proceedings should be had before "the supreme, superior, district or circuit court of some one of the States, or of the Territories northwest or south of the River Ohio, or a circuit or district court of the United States."

This act in turn was repealed by the Act of April 14, 1802 (2 Stats. at L., 153), by which the number of courts before which naturalization proceedings could be brought was again enlarged, and such proceedings authorized "before the supreme, superior, district or circuit courts of some one of the States, or of the territorial districts of the United States, or a circuit or district court of the United States."

By section 3 of this act Congress itself defined what it intended by the words "circuit or district courts" in so far as applied to the States, the section providing that since some doubt had arisen over the inclusion of certain State courts within the description of circuit or district courts, "every court of record in any individual State, having common-law jurisdiction, and a seal and clerk or prothonotary, shall be considered as a district court within the meaning of this act."

This stood as the law until the adoption of the Revised Statutes, section 2165 of which has been quoted *supra*.

It is obvious that under the law prior to the adoption of the Revised Statutes the circuit courts of Hawaii would have been among the courts authorized to conduct naturalization proceedings, whether it is considered that the words of the statute were to be regarded as proper names or as words of description. That they were and now should be considered words of description only is made clear by section 3, to which attention is above called.

The opportunities for naturalization have been still further extended by the Act of June 29, 1906 (34 Stats. at L., 596), which grants exclusive power to naturalize to—

"United States circuit and district courts now existing, or which may hereafter be established by Congress in any State, United States district courts for the Territories of Arizona, New Mexico, Oklahoma, Hawaii, and Alaska, the Supreme Court of the District of Columbia, and the United States courts for the Indian Territory; also all courts of record in any State or Territory now existing, or which may hereafter be created, having a seal, a clerk and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited."

It will therefore be seen that the tendency of the legislation on the subject has been to enlarge rather than to diminish the number of courts in which this power is vested.

Ex parte Cregg, 2 Curt., 98.

One of the principal reasons for investing Congress with this exclusive power was to guard against a too narrow instead of a too liberal mode of conferring citizenship.

Collet *v.* Collet, 2 Dall., 294.

The intent of the naturalization laws is that certificates of naturalization should issue from courts of record.

Spratt *v.* Spratt, 4 Peters, 393, 408.

Mutual Benefit Life Ins. Co. *v.* Tinsdale, 91 U. S., 238, 245.

Courts look with favor on naturalization proceedings.

McCarthy *v.* Marsh, 5 N. Y., 263, 284.

Ex parte Butterworth, 1 Woodb. & M., 323.

The intent of Congress, as shown by the various acts cited, was to grant to courts having certain jurisdiction, irrespective of name, the power to naturalize, and not to exclude any court having such jurisdiction.

Furthermore, section 2165, Revised Statutes, has been liberally construed as to the courts to which this power has been given; city, police, county, and criminal courts in various States, when courts of record, having a clerk and seal, have been held to be within the statute.

United States *v.* Power, 14 Blatch., 223.

Ex parte Gladhill, 8 Met., 168.

Ex parte Cregg, 2 Curtis, 98.

State *v.* Whittemore, 50 N. H., 245.

Re Conner, 39 Cal., 98.

Levy's Case, 14 A. G. Op., 509.

State *v.* Webster, 7 Neb., 469.

Morgan *v.* Dudley, 18 B. Mon., 693.

People *v.* McGowan, 77 Ill., 649.

United States *v.* Lehman, 39 Fed., 49.

Nor has it been considered necessary that the court have all the common-law jurisdiction that pertains to all classes of actions, but merely that it exercise its powers according to the course of the common law.

Re Dean, 83 Me., 493.

Re Conner, 39 Cal., 98.

People *v.* McGowan, 77 Ill., 649.

United States *v.* Lehman, 39 Fed., 49.

In order to ascertain the true intent of Congress, all the acts on the subject should be considered, both those passed subsequently as well as those prior in point of time to the section under consideration.

In U. S. *v.* Freeman, 3 How., 556, 564, Mr. Justice Wayne, in delivering the opinion of the court, laid down the following rule of construction:

"The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all of them to be taken into consideration in construing any of them, and it is an essential rule of law that all acts *in pari materia* are to be taken together as if they were one law. * * * If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of the statute, and if it can be gathered by a subsequent statute *in pari materia* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning and will govern the construction of the first statute."

See also——

Alexander *v.* The Mayor, etc., 5 Cranch, 1, 7.
United States *v.* Wong Kim Ark, 169 U. S., 649, 653.
Cope *v.* Cope, 137 U. S., 682, 688.
Fussell *v.* Gregg, 113 U. S., 550, 560.
State *v.* Gerhardt, 145 Ind., 439, 460.
Lyon *v.* Lyon, 88 Me., 395, 401.
State *v.* Slover, 126 Mo., 652, 659.
Simpkins *v.* Ward, 45 Mich., 559, 564.
Atkins *v.* Disintegrating Co., 18 Wall., 272, 301.
Stockdale *v.* Insurance Co., 20 Wall., 323.

D. Every construction that leads to a ridiculous conclusion must be rejected.

If it is contended that the statute should be strictly construed, then certain courts within the Territory which bear the name of district courts may be said to have power to naturalize.

There are in the Territory of Hawaii district courts, other than the Federal court, with well-defined jurisdiction.

Laws of 1892, chapter 57, Compiled Laws, section 1119 (now section 1662, Revised Laws), provides:

"SEC. 1662. The district courts shall have original and exclusive jurisdiction of all civil actions, except as otherwise

provided, when the debt amount or damages or the value of the property claimed shall not exceed fifty dollars, and concurrent jurisdiction in all civil actions except as aforesaid when the debt amount or damages or the value of the property claimed shall not exceed three hundred dollars, and shall have original jurisdiction in all statutory proceedings as conferred by law upon district courts, or which may hereafter be placed by law within the jurisdiction of district courts: *Provided, however*, That such courts shall not have cognizance of real actions, nor actions in which the title to real estate shall come in question, nor actions for libel, slander, defamation of character, malicious prosecution, false imprisonment, breach of promise of marriage, or seduction, nor of any civil matter required by law to be tried by a jury; nor shall they have the power to appoint referees in any cause."

These courts have not the jurisdiction of the circuit courts, are not courts of record and do not have clerks or seals, but section 2165, Revised Statutes, does not make the same requirements of the territorial district courts as it does of State courts. Hence a court similar to that presided over by a justice of the peace might be said to have the power to naturalize, to the exclusion of the circuit courts.

E. This court has in certain cases considered the effect of a decision.

In the case of Hawaii *v.* Mankichi, 190 U. S., 197, 215, this court used the following language:

"If the negative words of the resolution, 'not contrary to the Constitution of the United States,' be construed as imposing upon the islands every provision of a Constitution which must have been unfamiliar to a large number of their inhabitants and for which no previous preparation had been made, the consequences in this particular connection would be that every criminal in the Hawaiian Islands convicted of an infamous offense between August 12, 1898, and June 14, 1900, * * * must be set at large and every verdict in a civil case rendered by less than a unanimous jury held for nought. Surely such a result could not have been within the contemplation of Congress."

In considering the result of a holding that the circuit courts of Hawaii do not have power to naturalize, Chief Justice Frear, of the Hawaiian Supreme Court, spoke as follows (Tr., p. 17):

"Not only is there no objection to the exercise of such jurisdiction by the circuit courts, for similar courts throughout the States and Territories exercise it, but it is particularly desirable that they should have it, because in four of the five circuits of the Territory the Supreme Court cannot sit, and in three the United States district court does not sit, and in one of the other two the latter court sits only once a year, although it is permitted by the statute to sit at other times and places; and such time and expense would be required for the attendance of applicants where such courts usually sit as would in many instances be prohibitive. Such jurisdiction has been exercised by the circuit courts ever since the establishment of territorial government, and probably the majority, about a thousand, of naturalizations, have taken place in those courts. I believe the exercise of such jurisdiction by the circuit courts was begun on the suggestion of United States District Judge Estee, and more recently an application to his successor, Judge Dole, for naturalization, by one whose naturalization by a circuit court had been questioned, was denied."

It is respectfully submitted that the judgment of the Supreme Court of Hawaii should be affirmed and the writ of error issued herein dismissed.

WASHINGTON, D. C., October 12, 1908.

C. R. HEMENWAY,
Attorney-General of Hawaii,
for Defendant in Error.

M. F. PROSSER,
Of Counsel.

KAIZO *v.* HENRY, HIGH SHERIFF OF HAWAII.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 27. Argued October 29, 1908.—Decided November 16, 1908.

While a court of competent jurisdiction may discharge a prisoner held by another court which has exceeded its jurisdiction, even in such a case the prisoner may be remitted to his remedy by writ of error.

No court may properly release a prisoner under conviction and sentence of another court unless for want of jurisdiction of cause or person or some matter rendering the proceeding void.

Where a court has jurisdiction mere errors cannot be corrected upon *habeas corpus*.

Disqualifications of grand jurors do not destroy jurisdiction if it otherwise exists, and the indictment though voidable is not void; and objections seasonably taken in the trial court if erroneously overruled must be corrected by writ of error and not by proceedings in *habeas corpus*.

18 Hawaii, 28, 658, affirmed.

THE facts are stated in the opinion.

Mr. Duane E. Fox and *Mr. Arthur S. Browne*, with whom *Mr. A. S. Humphreys* was on the brief, for plaintiff in error.

Mr. Charles R. Hemenway, with whom *Mr. Mason F. Prosser* was on the brief, for defendant in error.

MR. JUSTICE MOODY delivered the opinion of the court.

This is a writ of error directed to a judgment of the Supreme Court of the Territory of Hawaii, discharging a writ of *habeas corpus* and remanding the petitioner to the custody of the sheriff. The plaintiff in error was indicted for murder by a grand jury at a term of a Circuit Court of the Territory, held in August, 1905. The grand jury was composed of sixteen members. A plea in abatement was seasonably filed, alleging that

eight of the grand jurors were not citizens of the United States or of the Territory, a qualification prescribed by the laws of the Territory. The Territory joined issue on this plea. The parties then agreed upon the facts upon which it was based, namely, that the eight grand jurors questioned were citizens only by virtue of judgments of naturalization in a Circuit Court of the Territory. The plea, with the agreed facts, raised the question of the jurisdiction of the Circuit Courts of the Territory to naturalize aliens. Under a statute of the Territory that question was certified to the Supreme Court, and that court held that the Circuit Courts of the Territory had jurisdiction to naturalize and that the grand jury possessed the necessary qualifications. Thereupon the trial judge overruled the plea in abatement, and an exception was taken. After due proceedings, plaintiff in error was found guilty as charged, and, on March 22, 1906, sentenced to death. Thereupon he prosecuted a writ of error to the Supreme Court of the Territory, assigning, among other errors, the overruling of the plea in abatement. The judgment of the lower court was affirmed by the Supreme Court on October 23, 1906, and a death warrant thereupon was issued by the Governor of the Territory, commanding the high sheriff to execute the sentence of death on January 22, 1907. No writ of error was sued out on the foregoing judgments of the Supreme Court. The plaintiff in error, however, six days before the date fixed for his execution, filed a petition for *habeas corpus* in the Supreme Court of the Territory, basing his claim for discharge from custody upon the same facts set forth in the plea in abatement and in the agreed statement of facts. The petition alleged that for the reason of the disqualification of eight members of the grand jury, the indictment was void, and that the trial court was without jurisdiction to proceed against him under it. The writ of *habeas corpus* was discharged and the petitioner remanded to the custody of the sheriff, and to this judgment the present writ of error is directed.

The principal question argued before us by counsel is, whether the eight members of the grand jury, whose qualifications were

questioned, were naturalized by courts having the authority to naturalize aliens. But we find no occasion to decide or consider this question. If the plaintiff in error desired the judgment of this court upon it he should have brought a writ of error to the judgment of the Supreme Court of the Territory which passed upon it in affirming the judgment of conviction in the trial court. He may not lie by, as he did in this case, until the time for the execution of the judgment comes near, and then seek to raise collaterally, by *habeas corpus*, questions not affecting the jurisdiction of the court which convicted him, which were open to him in the original case, and, if properly presented then, could ultimately have come to this court upon writ of error. Unquestionably, if the trial court had exceeded its jurisdiction a prisoner held under its judgment might be discharged from custody upon a writ of *habeas corpus* by another court having the authority to entertain the writ, *Ex parte Lange*, 18 Wall. 163; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Wilson*, 114 U. S. 417; though even in a case of this kind a court will sometimes refrain from releasing a prisoner upon writ of *habeas corpus*, and will remit him to his remedy by writ of error. *Riggins* v. *United States*, 199 U. S. 547; *Urquhart* v. *Brown*, 205 U. S. 179. But no court may properly release a prisoner under conviction and sentence of another court, unless for want of jurisdiction of the cause or person, or for some other matter rendering its proceedings void. Where a court has jurisdiction, mere errors which have been committed in the course of the proceedings cannot be corrected upon a writ of *habeas corpus*, which may not in this manner usurp the functions of a writ of error. *Ex parte Parks*, 93 U. S. 18; *Ex parte Siebold*, *supra*, 375; *Ex parte Yarbrough*, 110 U. S. 651, 653; *Ex parte Wilson*, *supra*, 421; *In re Delgado*, 140 U. S. 586; *United States* v. *Pridgeon*, 153 U. S. 48, 59, 63; *Andrews* v. *Swartz*, 156 U. S. 272, 276; *Riggins* v. *United States*, *supra*; *Felts* v. *Murphy*, 201 U. S. 123; *Valentina* v. *Mercer*, 201 U. S. 131.

These well-settled principles are decisive of the case before us. Disqualifications of grand jurors do not destroy the jurisdiction of the court in which an indictment is returned, if the court has jurisdiction of the cause and of the person, as the trial court had in this case. *Ex parte Harding*, 120 U. S. 782; *In re Wood*, 140 U. S. 278; *In re Wilson*, 140 U. S. 575. See *Matter of Moran*, 203 U. S. 96, 104. The indictment, though voidable, if the objection is seasonably taken, as it was in this case, is not void. *United States* v. *Gale*, 109 U. S. 65. The objection may be waived, if it is not made at all or delayed too long. This is but another form of saying that the indictment is a sufficient foundation for the jurisdiction of the court in which it is returned, if jurisdiction otherwise exists. That court has the authority to decide all questions concerning the constitution, organization and qualification of the grand jury, and if there are errors in dealing with these questions, like all other errors of law committed in the course of the proceedings, they can only be corrected by writ of error.

Judgment affirmed.